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JULIUS SALK, HARRY SALK and MAX WARD.

(Plaintiffs) Appellees,

WILLIAM D. SIMMONS.

(Defendant) Appellant.

APPEAL FROM
MUNICIPAL GOURT
OF CHICAGO.

Opinion filed Nov. 6, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiffs, Julius Salk, Harry Salk and Max Ward, brought their suit in assumpsit against the defendant William B. Simmons, to recover rent for the months of May, June, July, August and September, 1937, at the rate of \$90.00 per month. The claim is based on the holding over of the defendant as a tenant under a yearly lease and failure to surrender possession of the premises at its expiration, April 30, 1937. At the close of the evidence the court peremptorily instructed the jury to find the issues in favor of the plaintiffs and against the defendant for \$360.00. Judgment was entered upon the verdict, from which an appeal was prayed and allowed to this court.

Defendant by his answer admits holding over after the expiration of the lease, but contends it was under a special arrangement with the Austin Realty Co., acting as agent for the plaintiffs and that, under this arrangement, he was to pay the sum of \$3.00 per day while he used and occupied said premises. It is not disputed that the Austin Realty Co. was the agent of the plaintiffs for the purpose of collecting rent under the lease.

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Opinion filed Nov. 6, 1923

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Counsel for the defendant offered to prove by the defendant that a certain Mr. Warner of the Austin Realty Co. was present at the time the lease was executed and was the person to whom the lease was delivered and that he, the defendant, paid his rent at the office of the Austin Realty Co. and that he told the said Warner that he desired to remain for a few days after the termination of the lease and was informed by Mr. Warner that it would be all right and that he could occupy the premises at so much per day until the defendant had finished the construction of a garage into which he the defendant intended to move his truck as soon as the garage was completed. Simmons testified further that certain signs, stating that the premises were up for rent after the month of April, were placed upon the premises in February, 1927. This offer of proof as made by counsel for the defendant was objected to and the objection was sustained. It is urged for reversal that the court erred in excluding this evidence, on the ground that it was admissible as binding upon the principals, on the theory that the acts of the agent were the acts of the principals.

which tended to show that the principals, the plaintiffs in this cause of action, were apprized of and cognizant of the actions of Warner or the Austin Realty Co. in negotiating an arrangement for the continued occupancy of the premises by the defendant. The agency of the Austin Realty Co. was a limited agency and, so far as the record discloses, was confined to the collection of rents. As agent of the plaintiffs, it had no right to alter, extend or terminate the lease to the premises in question without a direct authorization from the principals. No such authorization having been shown, nor any offer to prove the same, the testimony

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was inadmissible and incompetent and the court committed no error in refusing to permit it to go into the record. Under the law, a tenant holding over after the termination of his lease is presumed to be a tenant under the terms of the original lease for the ensuing year. <u>Meyers v. Johnson</u>, 186 Ill. App. 37. The agent has no authority to consent to a change in the terms of the lease. <u>Wieboldt v. Best Brewing Company</u>, 163 Ill. App. 246.

The "For Rent" signs on the premises, according to the testimony, were placed upon the premises in February and the alleged agreement between the agent and the defendant was made in April. We are not impressed with the fact alone, that these signs were on the premises with the knowledge of the plaintiffs. This fact could in no way constitute an affirmation of an agreement between the defendant and the Austin Realty Co. extending the time of the tenancy.

For the reasons stated in this opinion the judgment of the Eunicipal Court is affirmed.

JUDGMENT AFFIRMED.

HINER AND HOLDON, JJ. CONCUR.

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For the remarks stated in this opinion the judgment of the funities? Court is afficued.

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(Pleintiff) Appellee,

ST. FAUL FIRE AND MARINE INSURANCE COMPANY, of St. Paul, Innesota and WM. T. HEINEMANN,

(Defendants)

oh Appel of ST. PAUL AND MARINE INSURANCE COMPANY, of ST. Paul, Minnesota.

Appellant.

of chicago.

BAL PROM

MUNICIPAL COURT

Opinion filed November 21, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiff Fred W. Neely, brought his action to recover uncarned premiums on a certain policy of insurance, bearing number J-83658, issued by the St. Paul Fire and Marine Insurance Company, defendant. From the facts it appears that the policy of insurance and the premiums amounted to the sum of \$181.66. The policy was delivered to the plaintiff by one William T. Heinemann and the premium collected by him. From the facts we gather, it was not paid by Heinemann to the said insurance company.

June 15, 1927, the insurance company, through its general agent, A. F. Shaw & Company, mailed to the plaintiff what purported to be a final notice, saying that if such premium was not paid on or before June 22, 1927, the contract of insurance would be canceled without further notice to the insured. Hovember 27, 1929, suit was brought and the cause tried before the court without a jury, resulting in a finding in favor of the plaintiff and judgment for the sum of \$92.53,

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ST. FAUL FIFT ASS HABINE INSURANCE CONTANT, OF St. Foul.

(Before tentent)

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## Opinion filed November 21, 1929

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The plaintiff Feet K. Leafy, brought his motion to receive the receive to receive the receive of the receive the bearing number 1-62662, issued by the St. Tenl fire and later in Insurance Company, defendant. From the Years it appears that the policy of numbers and the president no maked to the same of \$161.55. The policy was delivered to the constitut by one william F. Matromera are the president of the formation of the force we gether, it use or reid by Heinstern to the same and the same and the force we gether, it use or reid by Heinstern to the same to the same and insurance commany.

June 15, 1367, the authorse company, entart its plantiff greezes agant, t. 5 has t factory, entity to the plantiff whet purported to be a final notice, explor that if much premium was not paid on an befor that 22, 1827, the contract of inverse and the contract instituted before the contract of the concentration before the concentration of the concentration before the concentration of the close the first of the close the concentration of the concentration of the close the first of the close the concentration of the close the close the concentration of the concentration o

together with costs. It is from that judgment this appeal has been perfected.

It is urged by the defendant that the judgment should be reversed, because there was no evidence on the part of the plaintiff establishing any relationship of agency between Heinemann and the defendant St. Paul Fire and Marine Insurance Company or A. F. Shaw & Company, General Agents. It is also insisted that even though this agency might be shown, neverthe-less, the notice of the defendant St. Paul Fire and Marine Insurance Company to the effect that it would cancel the policy was, in fact, not a cancellation, but a more notice that such would be done in the future. The testimony on behalf of the plaintiff tended to show that the policy was issued by the defendant company, St. Paul Fire and Marine Insurance Company, through its general agent, A. F. Shaw & Company; that the premium was paid to Meinemann who delivered the policy to the plaintiff and seceived the premium in payment therefor.

The evidence on behalf of the defendant shows that the premium was not received by the defendant or A. F. Shaw & Company, its general agent, but that an account was carried on the books of the A. F. Shaw & Company in the name of W. F. Heinemann and that he had evidently written other insurance through A. F. Shaw & Company upon which he had been credited with commissions. It is insisted by defendant that Heinemann was a street broker and was, in fact, the agent of the plaintiff, but this does not appear to be borne out by the record. The cases cited by defendant relate to instances where a sub-agent has attempted to vary the terms of the policy, but this question is not involved in this proceeding.

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The only question appears to be as to whether or not the insurance company, which has entrusted a policy of insurance to a person for delivery, is bound by his action in accepting the payment of the premium and, consequently, become liable to the insured.

The Supreme Court of this State in the case of Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545, in its opinion says:

"Under such circumstances, who should bear the loss arising from the fraud committed by the street broker? Should it fall upon the plaintiff, who was an innocent party in the transaction, or should it fall upon the company, who slone enabled Puschman to successfully consummate the contract of insurance by placing in his hands the policy for delivery? The street broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her or bind her in any manner whatever by what he might do in the premises; and while he may not have been, in fact, the agent of the company, still, the company, by placing the policy in the hands of the street broker for delivery, is estopped from claiming that the payment made to him upon the delivery of the policy is not binding upon the company."

There is no evidence in this case, so far as we are able to ascertain, that Heinemann was acting as the agent of the plaintiff. The fact that he had an account with the general agent of the defendant, and that this account was carried upon their books and that he had procured other insurance through them, rather tended to show that he was, in fact, the agent of the company, acting through their general agents.

It is insisted that the notice of final cancellation was, in fact, a final cancellation of the policy, that therefore, the plaintiff could not recover. The cases cited in support of this contention appear to be based upon facts showing that a loss occurred after such notice and before the policy was, in fact terminated. In the case at bar, however,

The only question appears to so so to whether or not the contracted a policy of ast the insurance to a person for delivery, is bound by als active in according the parents of the president of the president.

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the policy contained a provision to the effect that the policy might be canceled upon a written request by the insured, the company retaining or collecting the customary short rates for the time it had been in force. The notice of the company dated Jun# 15, 1927, to the assured to the effect that after June 22, 1927, it would expeel the policy if the premium was no paid, without further notice to the assured, was sufficient to authorize the plaintiff to start suit. The starting of the suit was a sufficient notice to the defendant, St. Paul Fire and Marine Insurance Company that the insured intended to terminate the contract. We see no force in this argument advanced by the defendant. Moreover, it is inconsistent with its previous position that there was, in fact, no policy of insurance because of the fact that Heinemann had no authority to consumate a contract between the plaintiff and the defendand, and, therefore, there was no policy of insurance in existence.

The plaintiff having elected to terminate the policy by starting suit November 7, 1927, was entitled to recover the unearned premium from that time until December 31, 1927, at which time the policy terminated by its own terms.

The judgment entered in the cause was for \$92.53. The correct amount of the judgment should have been \$39.40,the same being that proportionate share of the premium
from November 7, 1927, to December 31, 1927, together with
interest.

This cause having been tried by the court without a jury, the judgment of the trial court will be reversed and a proper judgment entered here in favor of the plaintiff

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for the sum of \$39.40.

For the reasons stated in this opinion the judgment of the Municipal Gourt is reversed and judgment is entered here for the plaintiff for the sum of \$29.40, each party to pay its own costs.

JUDGMENT REYERSED AND JUDGMENT HERE.

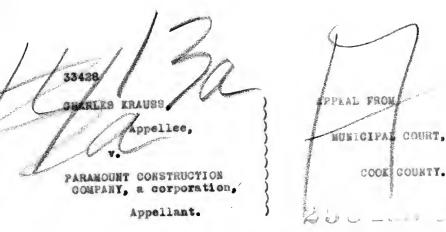
RYNER AND HOLDOM, JJ. CONCUR.

for the aug of \$29.40.

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Opinion filed Nov. 6, 1939

COOK! COUNTY.

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Charles Kraues, plaintiff brought his action against the defendant, Paramount Construction Company, a corporation, to recover compensation claimed to be earned as commission on contracts for paving procured by him on behalf of the defendant. The jury was waived and the cause submitted to the court, resulting in a finding in favor of the plaintiff in the amount of \$1,107.63, on which finding judgment was entered and an appeal prayed and allowed to this court.

Plaintiff's claim is based on an oral contract, under which he was to receive ten per cent commission on all contracts obtained by him. The plaintiff procured four contracts for paving of alleys. The defendant admits plaintiff's ten per cent interest as to the first contract, but insists that the agreement was changed as to the remaining three contracts and that by the change he was to receive all there was above \$3.70 per square yard, coming to the defendant. The defendant offered in evidence a statement of its books, prepared by its bookkeeper, which was admitted by the court for the sole and only purpose of showing that a payment of \$532.67 had been credited to the plaintiff. Plaintiff insists that it was error on the part of

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Opinion filed Nov. 6, 1989

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the trial court in not permitting the statement to go in for all purposes as bearing out defendant's contention that there had been a change in the contract and that there was nothing due the plaintiff. The books of the defendant company were not offered in evidence by the defendant. A statement was made by counsel for defendant that they were in court, but the proper way to prove them was by their introduction in evidence, if they were competent for any purpose. Welsh v. Shumway, 232 111.54.

It is unquestioned that after books of account have been introduced in evidence, where the accounts are complicated and involved, a written statement of the account, prepared by a person qualified for that purpose who has made an examination of the books, may be admitted in evidence if the trial court is of the opinion that it will assist and aid the jury or the court in arriving at its verdict or finding.

We may assume that the court was of the opinion that in the instant case the account was not so involved or complicated as to require such a statement, in which event the books should have been offered in evidence and the question squarely submitted to the trial court as to whether or not they were admissible.

We find no error in the ruling of the court and, for the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

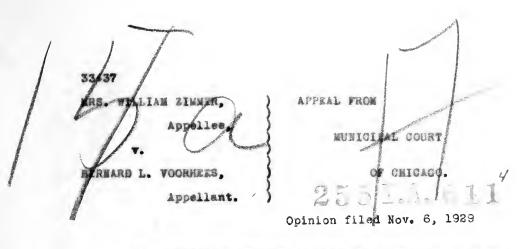
RYNER AND HOLDON, J. J. CONGUR.

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MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Firs. William Zimmer, the plaintiff, filed her suit for rent, based on a certain lease, against Bernard L.

Voorhees, the defendant, and the tenant in said instrument. Befendant filed his appearance, together with a jury demand and also filed his affidavit of merits to said cause of action. After said cause was at issue, the plaintiff proceeded to start another action and confessed judgment on the lease in question. Defendant moved to vacate and set aside the judgment entered by confession and to abate said cause because of the pendency of a prior action at law, involving the same parties and the same subject-matter. After a hearing upon the motion, the court ordered the first proceeding to be dismissed and denied the motion of defendand to set aside the judgment by confession and to dismiss the cause because of the pendency of the prior action.

A plea in abstement, setting forth there is a prior action pending involving the same parties and the same subject-matter, unless it comes within one of the exceptions, such as concurrent remedies, is a good plea. The law does not favor numerous suits and where one action will furnish a proper remedy, the bringing of subsequent actions without the dismissal of the prior suit is against the spirit of the law and will be

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Opinion filed Nov. 6, 1928

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abated. It appears to be the rule, however, in this State that a dismissal of the prior action, even after the plea, avoids the abatement of the second suit.

The Supreme Court of this State in the case of Gage v. Sity of Chicago, 216 Ill. 107, in its opinion said:

"The court ruled the dismissal of the prior proceeding avoided the objection that a former action was pending, and declined to dismiss this proceeding but proceeded to final judgment, and this is urged as for error. Appellants refer to the ancient rule of common law pleading that a plea of another suit pending, if proven, abates the second action, and counsel for the city cite the later holdings, and what seems to be the current of modern authority, that the dismissal of the prior action, even after the plea, avoids the abatement of the second suit. "

while this action was a special assessment proceeding, and it appears that objections were filed to the assessment based on the merits, as well as objection on the ground of a prior suit pending, nevertheless, the language used by the court as to the rule appears to be clear and unsabiguous.

The court in the case of <u>Jerseyville Shoe Mfg. Co.</u> v. Bell, 125 Ill. App. 496, in its opinion says:

"Appellant first contends that the court erred in overruling its demurrer to the first and second replications; that the plea in abatement was good when filed and that appellee could not, after the filing of the plea, dismiss his former suit and then set that fact up by replication in answer to the plea. This subject is one upon which the authorities are not altogether in accord and while the author and compiler of the first edition of the American and English Encyclopedia of Law, vol. 8, page 551, supports the contention of appellant, yet we do not think that such statement there made is in accord with the more modern holding of the courts. the Encyclopedia of Pleading and Practice, a somewhat more recent work by the same authority, vol, 1, on page 755, the writer says that 'The prevailing rule now is that the discontinuance or dismissal of the first suit after the commencement of the second may be set up in reply to the plea and thus defeat an abatement,' and in a note on page 756, says: 'According to the later cases, the objection of a former suit pending is removed of triffication and animate of of theory all absorbed and triffication and triffications and the constant of the solutions.

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by its dismissal or discontinuance, even after plea in abatement in the second suit, and cites many authorities in support of the more modern rule. There was no error in the action of the court in overruling the demurrer to said replications.

To the same effect see Wright v. Keifer, 131 111. App. 298.

Worsever, the affidavit in support of the motion to vacate the judgment appears to be based principally upon the fact that there was another suit pending and did not go to the merits of the action. Such an affidavit must contain facts, in support of the motion to vacate the judgment, which constitute a defense to the action upon the merits. A plea in abatement is purely a dilatory plea, western Hardware Co. v. Chandler, et al. 211 III. App. 513. The sufficiency of the facts, upon which the court acted in denying the motion to vacate the judgment, has not been presented or urged as a ground for reversal in the brief filed in this court. We, therefore, assume that the court rightfully exercised its discretion in refusing to open the judgment, and permit Voorhees the right to come in and defend.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDON, JJ. CONCUR.

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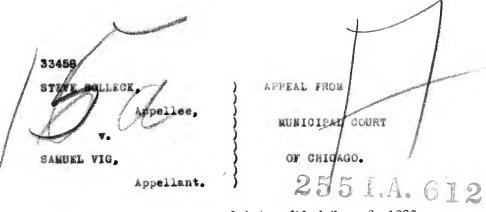
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Opinion filed Nov. 6, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Steve Bolleck, the plaintiff, brought his action against Samuel Vig, defendant, for work and labor performed on certain buildings belonging to the defendant, located at Knox, Indiana. The defendant filed his affidavit of merits, charging among other things, that the plaintiff had brought suit on the same claim for the same amount and for the same work in Starke County, Indiana; that the cause was tried before the Circuit Court of that County and resulted in a finding and judgment in favor of the defendant.

the proof sustained the position of defendant, namely, that
the matter was res adjudicata, and therefore, the plaintiff
not entitled to recover. To sustain the issues on behalf of
the defendant, counsel introduced in evidence a certain record
of the proceedings in the case in Starke County, Indiana.
This record included a notice of mechanics' lien for work,
labor and material furnished at the request of the defendant
upon the premises in question, together with a copy of the
complaint filed in said cause. The complaint charges that on
the 30th day of May, 1925, the defendant was the owner of the
premises in question and entered into a certain written contract,
under which the plaintiff agreed to perform the work and labor

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Opinion filed Nov. 6, 1989

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in question, for a fixed price. A copy of the contract attached to the complaint appears to be signed by the defendant and the plaintiff, together with two other persons, John Rehor and Steve Dobay. The complaint filed in said cause charged that the said John Rehor and Steve Bobay claim to have some interest in the contract and refuse to join with the plaintiff and are, therefore, made parties defendant. Charges further that said claim, if any, is subsequent to and junior to this claim. The judgment order in said record shows that the cause, being at issue, was submitted to the court without a jury and, the court having heard evidence and being duly advised in the premises, found that the plaintiff took nothing by his complaint and that the defendant recovered costs.

From a reading of the complaint it is apparent that it is for work and labor upon the premises of the defendant; for the same work; for the same amount and for the same period of time. It is insisted, however, on behalf of the plaintiff in the instant case that, while a written contract was entered into, the fact was that the said John Rehor and Steve Dobay, who were to have been associated with the plaintiff in the work, had bithdrawn from the contract and that the work and labor was done and material furnished by the plaintiff alone, and that, therefore, the principal case was based upon a novation and not upon the original contract. Further that the record filed for the purpose of showing the prior adjudication, appears to have been tried upon an amended complaint which is not included in the record and that; therefore, the proof as to what was involved in the prior decision is not in exidence. In answer to this it may be said that the judgment order itself, contained in said record, appears to be based upon the complaint and not upon an amended complaint, although the word "insert" in parentheses

in question, for a fixed price. A cony of the contract off when to to the complete spaces to be signed by "in thick int and the contractiff, topesher with and other present, one that had been point, but and five said into all course nothers that for court int for any that is to be most ist and in the court interest that the court fore, and perfect to refer to read the fore, and perfect to the present of the court interest to the judgment order in a sin require the court judgment order in a sin require title of the court in the perfect of the design of the

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on cross-examination the plaintiff admitted that he had started suit in Starke County, Indiana against the defendant; that the contract was the same; that the suit was for the same work and for the same amount as involved in the instant case. This admission, coupled with the record as we find it, is sufficient in our opinion to show that the same issues were involved in the proceedings in Starke County, Indiana as are involved in this proceeding.

while it is true, as a general rule, that the record is the best evidence, nevertheless, the final judgment order in the cause, coupled with the admissions of the plaintiff, are, incour opinion, sufficient to show a prior adjudication between the persons as to the claim in question. While the record indicates the filing of an amended complaint and is silent as to what it contained, it does appear that a general denial was filed by the defendant and the court found the issues in his favor. Under the circumstances, the testimony of the plaintiff on cross-examination was competent.

Herman in his work on Estoppel and Res Judicata, Page 234, Section 211, says:

"Parol evidence is admissible to show what facts, not inconsistent with the record, were necessarily or actually the basis of the finding, where the record is silent; and in aid of the judgment to identify the parties, as well as to identify the controversy and show that the matters in issue and decided in the first action are the same as those presented for determination in the accord."

The position taken by the plaintiff, that the instant case is based upon a novation, is without merit. From the

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evidence it is apparent that the conditions were existent at the time of the starting of the prior action in Starke County, Indiana and the plaintiff saw fit to elect to sue on the written contract, rather than upon the alleged novation.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed and judgment entered here for the defendant.

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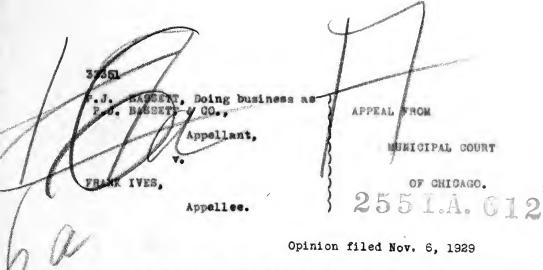
RYNER AND HOLDOM, JJ. CONCUR.

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MR. JUSTICE HOLDOW delivered the opinion of the court.

On a trial before the court without the intervention of a jury, by agreement of the parties, there was a finding and judgment in favor of the defendant, and plaintiff appeals.

The action was brought by plaintiff against defendant for a real estate broker's commission claimed to have been earned by plaintiff under a written contract for the exchange of real estate between defendant and one David Posner.

In plaintiff's statement of claim it is charged that plaintiff was a duly licensed real estate broker at Chicago, and that about May 19, 1927, the defendant Ives employed him as a broker to procure for him a purchaser for his property 7042-7048 Michigan Avenue, or in lieu of a purchaser to procure for him an exchange of the aforementioned property; that defendant promised plaintiff to pay commissions as fixed by the Chicago Real Estate Board, if a purchaser or an exchange contract was procured.

Plaintiff alleges that through his efforts a contract was made between defendant Ives and one Bavid Posner for an exchange of properties at a consideration of \$150,000; that a written contract to that effect was entered into, copy of which contract was attached as an exhibit and made a part of the

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statement of claim; that the regular commission fixed by the Chicago Real Estate Board for negotiating exchange contracts was three per cent of the price of the property, and that in accord therewith plaintiff is entitled to recover the sum of \$4500.

The case went to trial upon an amended affidavit of merits, which admitted that plaintiff was a licensed real estate broker and was employed by defendant to procure a purchaser for defendant's property, or in lieu thereof a person ready, willing and able to exchange the property with defendant, and admits that defendant agreed to pay plaintiff the regular real estate broker's commission according to the rules of the Chicago Real Estate Board, and that on the 19th day of May, 1927, defendant entered into a contract of exchange with one David Posner at the request of plaintiff. Defendant then alleged that said David Posner at the time of entering into the contract and at the expiration thereof was unable to comply with its terms, or that he could not supply a good merchantable title to the property due to certain material defects in the title, and was unable to comply with the terms of the agreement through no fault of defendant. Defendant further states that he was at all times ready, able and willing to comply with his part of the agreement and with the terms as set forth in the contract. Defendant denies that phaintiff procured a person ready, able and willing either to purchase defendant's property or to furnish defendant a complete merchantable abstract of title or any other evidence showing that the purchaser had good and sufficient title at the time of the contract or at its expiration, as set forth in plaintiff's exhibit A attached to his statement of claim.

Upon the trial plaintiff introduced the contract of

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exchange between defendant and Posner and then rested his case.

Under the admissions of defendant's second amended affidavit of merits, as above recited, and the introduction by plaintiff in evidence of the contract between defendant and Posner for an exchange of property, executed by defendant and Posner, plaintiff had made a prima facie case, which, mithout countervailing proof, would entitle him to recover the commission sued for. Lucas v. Schwartz, 343 Ill. App. 418, is an authority in point sustaining the foregoing statement. This court said inter alis in the Lucas case:

"The trial court held that, it being shown that the defendants had entered into a written contract with Stukis and his wife - the purchasers procured by the plaintiff - a prima facie case was made out in favor of the latter, to the effect that he had procured parties ready, willing and able to make a transaction agreeable to the defendants. In our opinion that ruling was correct."

An attempt was made by defendant to prove by oral evidence that the title to Posner's property covered by the contract was defective. There is no competent evidence in the record to that purport or effect. It is the law that title to real estate can only be proven by documentary evidence. As said in Evans v. Gerry, 174 Ill. 595;

"A number of attorneys and examiners of real estate titles were offered by appellee to show the title to appellant's property was defective. This was improper. The sufficiency of any title to real estate property is a question of law, and not of fact to be proven by the opinions of witnesses."

In Osborn v. The People, 103 III. 224, the court said on this point:

"Even if the validity of the organization of a corporation could be attacked in a collateral proceeding, the rules of evidence do not permit the proof of the want of title to land by verbal testimony. The title to real

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estate is required to be in writing, under seal, and all know that the contents of such instruments cannot be proved by verbal testimony unless the original is lost or destroyed. The best evidence must be produced and secondary evidence cannot be admitted unless the best is not attainable. Title, or the absence of title, cannot be proved by verbal testimony so long as there is written evidence. Here there was an attempt to prove the want of title by persons that may be wholly unqualified to determine what constitutes title. many cases the best land lawyers and most skillful conveyancers are perplexed to determine whether a title is or is not perfect. This illustrates the wisdom of the law in requiring the evidence of title to rest in writing, and all questions as to the validity of the title to be determined by courts when contested, and not by persons unskilled as to what constitutes title. Men would be insecure in their possessions if their title deprendedon the opinions of their neighbors, The rules of evidence whether educated or illiterate. were violated in this case by admitting the mere opinions of witnesses to prove title in this case."

The foregoing dicta is peculiarly appropriate to the facts in the case at bar. The attempt here was to prove that Posner's title was defective by oral testimony. Such testimony was inadmissible for that purpose. Furthermore the contract provided that if there were any objections made to the title, those objections should be in writing. None such was proffered in this case. We therefore hold that there was no competent evidence showing any defect in Posmer's title. Moreover it is admitted by defendant himself that the abstracts of title to the Posner property were in his possession. Therefore, if they showed any defect in the title, it was within his power to produce evidence of such defect from such abstracts. When counsel for plaintiff sought to prove this fact by the cross examination of the defendant, the court erroneously sustained objections made by defendant to such proof, and the court refused further to permit plaintiff to show by crose examination of defendant that no written objections to Posner's title were made. This was likewise error.

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In Doggett v. Greene, 254 Ill. 134, the court said:

"Br. Greene died before the trial but his deposition has been taken by the defendant. The plaintiffs offered in evidence certain questions and answers contained in the deposition in both the direct and cross-examination, making the witness their own for that purpose. The defendant cobjected to reading the cross-interrogatories and answers, on the ground that having made Br. Greene their own witness the plaintiffs were precluded from offering his testimony on cross-examination. In Adams v. Russell, 85 Ill. 384, it was held that where one party takes a deposition which is not withdrawn before the trial and fails or refuses to read it, the other party may introduce it and may read the cross-examination. The court did not err in that ruling."

In Adams v. Russell, 85 Ill. 284, it was said:

"It is next urged that the court erred in permitting appelless to read the cross-examination to Watson's deposition. We see no objection to such a practice. It has always been understood, that where one party takes a deposition, unless he obtains leave before the trial and withdraws it, if he fails or refuses to read it, the other party may introduce it. All depositions, so long as they are on file in the clerk's office, when properly taken and containing evidence pertinent to the issue, may properly be used as evidence on the trial."

In Acme Waste Paper Co. v. U. S. Paper Supply Co.,

233 Ill. :362, it was said:

"The court held the contrary, citing Adams v. Russell, supra, and observing that where one party takes a deposition which is not withdrawn before the trial fails or refuses to read it, the other party may introduce it and may read the cross-examination.' Other decisions substantially to the same effect are to be

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found in McCormick Harvesting Co. v. Laster, 81 III. App. 316; Bartlett v. Slusher, 117 III. App. 138, and Gustus v. Murdoch, 154 III. App. 270.

The court erroneously admitted in evidence at the instance of defendant and over the objection of plaintiff, a letter dated May 31, 1927, written by plaintiff to David Posner, which is as follows:

"On the signing of the contract for the purchase of the 32 flat building located at 7042-7044-7046-7048 Wichigan Avenue, Chicago, Illinois, it is agreed that this contract is null and void unless a second mortgage is arranged suitable to you."

This letter was written two days after the execution and delivery of the exchange contract between Ives and Posner. Therefore that letter was abortive to change the terms of the written contract, which was under seal. There is no reference to a second mortgage found in the contract between the parties. The contract is under seal and could not be changed by parol.

Yackey v. Barion, 269 Ill. 342; Alsohuler v. Schiff, 164 ibid.

298; Bretiman v. Fischer, 216 ibid. 143.

It appears that one Herbert E. Bradley appeared in the trial court as one of the attorneys for defendant and also represented David Posner. In the preliminary stage of the trial Bradley made a statement to the jury inter alia as follows:

"I think I will make a short opening statement, and enter my appearance as associate counsel, Herbert E. Bradley, and my office is 120 South EaSalle streets and I shall also be a witness in the case."

It was entirely unethical conduct on the part of Bradley to occupy the dual position of counsel and witness for a party in the same case. This practice has been condemned by our Supreme Court. It was effrontery for Bradley to state that he entered his appearance as attorney and also for the purpose of being a witness for his client. Bradley's testimony is entitled to but little if any credit. By his own action he discredited himself as a witness.

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As there must be a new trial, we refrain from passing upon the weight of the testimony, but for the erroneous rulings of the court in this opinion above indicated, the judgment of the Municipal Court is reversed and the cause is remanded for a new trial consistent with the law as enunciated in this opinion.

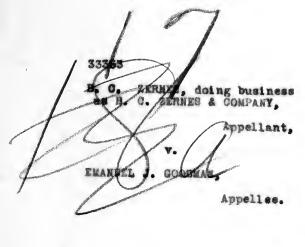
REVERSED AND REMANDED.

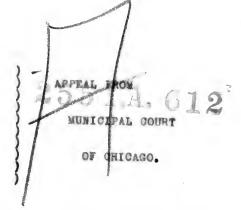
WILSON, P.J. and RYNER, J. CONCUR.

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Opinion filed Nov. 6, 1929

MR. JUSTICE HOLDOM delivered the opinion of the court.

The inception of this action resulted from the entry of a judgment by confession upon the following note:

Chicago, Ills. March 5, 1928.
Sixty days after date for value received I promise to
pay to the order of B. C. Zernes & Company Fourteen
Hundred
at the office of B. C. Zernes & Co. 19 S. LaSalle St.,
with interest at 6 per cent per annum after maturity
until paid. \* \* \*\*

(Here follows the warrant of attorney to confess judgment.)

(Signed) "Emanuel J. Goodman".

On August 21, 1928, there was a judgment entered by confession against defendant and in favor of plaintiff for the sum of \$1538.50, with costs. On motion of defendant, supported by an appropriate affidavit, the judgment was opened and defendant let in to plead. By agreement of the parties the case was submitted for trial before the court without a jury, and resulted in a finding against the plaintiff and the resulting judgment of nil capiat. The record is before us for review on the appeal of plaintiff.

Defendant has failed to appear on this appeal. In defendant's affidavit of meritorious defense he states that he was introduced to plaintiff for the purpose of making a loan for

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Opinion filed Nov. 6, 1929

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a building to be erected at 6219 - 27 South Kedzie Avenue, Chicago; that plaintiff represented to him that he could make a loan with the Schiff Trust & Savings Bank, but that he could get no commission from the bank and desired that defendant pay him a broker's commission representing that it should come out of the loan; that in order to be certain the commission would be paid he requested defendant to give a note for the amount of the commission, payable in 60 days with provision "that if loan was not obtained at that time that the note would be extended until opening of loan." Defendant further states that the loan has not been opened and the plaintiff in consequence is not entitled to his commission under the note executed, and he further shows in said affidavit that he has discovered since the execution of the note that plaintiff had an agreement with the "bank" whereby he was to receive a commission on the loan from them, and that the representation for the obtaining of said note was therefore false and fraudulent, and that the note was obtained by such false and fraudulent representation, and that therefore there was no consideration, or a total failure of consideration, for the execution and delivery of said note. That affidavit was made on the motion to vacate the judgment by confession and stood as an affidavit of merits in the cause.

It is clear from a reading of the note above set out that no condition is contained in it of any kind that the note shall not be paid when due by its terms. The note is the contract of the parties and cannot be changed in any manner by parol. The note is payable unconditionally and at a time certain and is binding upon the parties to it without any variation.

However, defendant testified on cross examination that he had title to the property on which he authorized plaintiff

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to" get" him a loan; that according to a letter date March 5. 1938, "addressed to plaintiff he agreed to pay a commission of 7% to them, "I didn't pay enything to Zernes but I gave them a note for the one per cent and that \$1400 note represented the one per cent. There isn't any question about that. I was to pay one per cent mentioned in this letter which read as follows: Above commission of one per cent is payable to you regardless of any commission which you may receive from your principal. " Defendant sent plaintiff a letter in which he said:

## "Gentelemen:

In consideration of One Dollar, receipt of which is hereby acknowledged, and in further consideration of your services in procuring for us a first mortgage loan for the sum of \$160,000.00 \*\* to be secured by our property at 6231 - 6237 South Kedzie Avenue, said loan to be placed according to the terms as provided for in our application to you \* \* we agree to pay a total commission of seven (7%) per cent. The commission is payable as follows: One (1%) per cent is to be paid direct to B. C. Zernes and Company \* \*. The above commission of one (1%) per cent is to be represented by a note payable as follows: able in 60 days or sooner if we receive the proceeds of the above loan before 60 days from date hereof. The above commission of one (1%) per cent is payable to you regardless of any commission which you may receive from your principal.

In the event of our failure to pay the above commission, and, should you confess judgment on our note, we hereby agree to waive all rights to contest the judgment for any cause whatsoever, and we hereby further agree to release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment."

That document is signed "Emanuel J. Goodman".

That letter which undisputedly eminates from defendant dissipates entirely the charge that the note was obtained by fraud or without consideration, or that it was to be paid except as in the note specified. Whatever was to become of the remaining 6% of the commission has no effect in any way upon the payment of the note in suit. It is patent from the foregoing letter that the note was to be paid in accord with its terms. According to the letter the time for the payment of the 1% commission was 60

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days and under the conditions in the letter stated might be paid sooner. The letter and the note taken together sustain each other and the statement in the letter is confirmatory of the date when the note is payable by its terms. It is patent from defendant's own evidence, de hors the note, that the \$1400 being 1% bommission due plaintiff, was to be paid at the latest at the time designated in the note, so that the defense of fraud and want of consideration is entirely dissipated by the evidence, oral and documentary, of the defendant himself.

Parol evidence is not admissible to change or alter the terms of the note in suit. Neither can the time of payment be postponed by an agreement resting in parol de hors the terms of the note, and all such evidence admitted on the hearing was so done erroneously. Gt. N. Hat Works v. Pride Hat Co., et al., 224 Ill. App. 249; Huss v. Ford, 197 ibid. 199; Bassett v. Ives. Gen. No. 33351, filed coincidently with this opinion.

It was held in <u>Handley v. Drum.</u> 237 ibid. 587, that under the general rule the party to a written contract may not contradict the terms of that contract by parcl. A defendant in an action on a note, unconditional in its terms, could not show by parcl, even as against the payee, that the parties had an understanding that the contract was in fact conditional. <u>Hesch</u> v. <u>Dennis</u>, 194 ibid. 663.

We find no evidence legally admissible on behalf of defendant which is sufficient to support the finding of the trial court. The judgment of the Hunicipal Court is reversed and judgment for the plaintiff entered here for \$1538.50, with interest thereon at 5% per annum from August 21, 1928, the date when the judgment was entered for plaintiff by confession in the trial court, amounting in all to the sum of \$1625.03.

JUDGMENT REVERSED AND JUDGMENT HERE FOR PLAINTIFF FOR \$1625.03.

WILSON, P.J., and RYNER, J. CONCUR.

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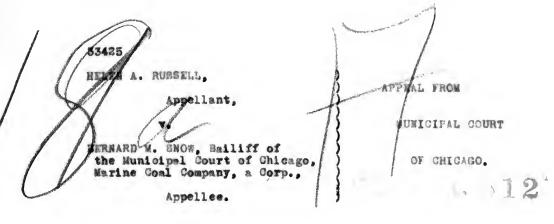
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Opinion filed Nov. 6, 1929

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action for the "trial of right of property" in which the plaintiff claimed to own four tons of Pocahontas Mine Run Coal, which the defendant Snow, bailiff, levied upon under a writ of execution of the Municipal Court of Chicago, in a case wherein Marine Coal Company, a corporation, was plaintiff, and Charles J. Russell (the husband and attorney of plaintiff) was defendant. Defendants filed no affidavit of merits or other pleading. The cause was tried before the court without the intervention of a jury, and there was a finding against plaintiff and that the property was rightfully in the hands of Snow, the bailiff. After overruling motions for a new trial and in arrest of judgment, there was a judgment on the finding, and plaintiff brings the record to this court for review.

The defendants have failed to appear and defend this appeal.

The plaintiff was her only withess and she testified that she owned the lease and purchased the furniture on the premises 931-33 Windsor Avenue, Chicago, for the sum of \$1400 from Waldemar Carlson in October, 1987; that the lease of the premises was assigned to her by Garlson the same day. The lease

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Opinion filed Nov. 6, 1929 was Justice Wollow of the arinion of the

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and bill of sale were offered and received in evidence without objection. She further testified that her husband. Charles J. Russell, had no interest either in the lesse or the furniture. which she used as a rooming house, and while her husband lived and boarded with her he paid \$100 a month for his board and room and that she purchased the rooming house lease and furniture with her own money; that she purchased coal from the Clark Coal Company and from the Marine Coal Company; that the coal taken by Snow, the bailiff, was part of the coal which she had purchased from the George Lill Goal Company, and she produced two bills in her own name, which were receipted. These receipted bills were likewise received in evidence. She also testified that she paid for the coal by bank money orders payable to her own order and by her endorsed to the George Lill Coal Company, which orders were offered and received in evidence. The also testified that the money used in the purchase of the rooming house was money she inherited prior to her marriage and which she had invested in a floral business where she had worked subsequent to her marriage, and also money that she had made from investments in chattel mortgages.

witness stand one Hoskins, the manager of the Marine Coal Company, who testified that he sold coal to Charles J. Russell on two occasions; that a man called him on the phone and stated that he was Charles J. Russell and to deliver six tens of coal to 931-33 Windsor Avenue; that the first order was for six tens and was paid for by the personal check of Charles J. Russell; that the last six tens were not paid for and that he sued Charles J. Russell for the value of the coal and obtained a judgment against him for the amount due for said six tens of coal.

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The foregoing was all the testimony offered or heard upon the trial of the case.

women have been emancipated from their common law disabilities as to owning property and conducting business in their own names without the interference of husbands, and in a measure, so far as property rights are concerned, under the statutes of this state, husband and wife are on a parity.

It will be seen from the foregoing testimony of plaintiff, which is not denied by any proof on the part of defendants, or either of them, that plaintiff was operating a rooming house and that the coal levied upon by Bailiff Snow was her property, bought and paid for with her own money, to be used in the operation of a rooming house carried on by her at 931-33 windsor Avenue, Chicago.

There is nothing in the proofs to discredit the sworn testimony of the plaintiff that the coal levied upon by Bailiff Snow under an execution against her husband was her individual property. There is no testimony that it belonged to any one else. The court had no right to arrive at a conclusion by suspicion, contrary to the sworn proof.

from the foregoing it is patent that the finding and judgment of the Eunicipal Court is contrary to the law and the evidence. That judgment is therefore reversed and a judgment entered here for plaintiff finding that the right of property in the four tone of Pocahontas coal at the time it was taken by defendant Snow, Bailiff, under an execution against Charles J. Rubbell, was in the plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE FOR PLAINTIFF.

WILSON, P.J., and RYNER, J. CONCUR.

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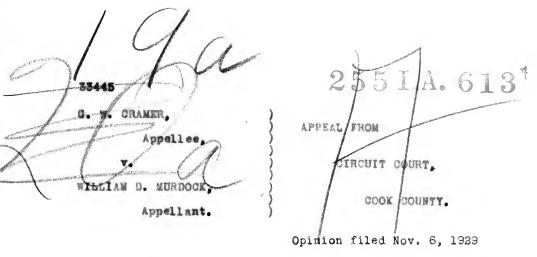
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MR. JUSTICE HOLDOM delivered the opinion of the court.

In the trial court on the motion of the plaintiff there was an order entered striking defendant's pleas from the record for want of a sufficient affidavit of merits and a judgment rendered as by default in the sum of \$1450, and defendant appeals.

The gravamen of the alleged error of the trial court is in holding that the affidavit of merits did not state a meritorious defense.

The difficulty with this case is that the abstract being the pleading of the parties, does not present any matter for review by this court. The abstract is as follows:

- \*1. Placita
- 3. Praecipe
- 5. Declaration
- 10. Affidavit of claim
- 12. Summons
- 14. Pleas and affidavit of merits
- 16. Order striking pleas for want of sufficient affidavit Default of defendant entered and judgment of merits. for \$1450.

Motion defendant to vacate and set aside.

Motion entered and continued to December 8, A. D. 1928.

- Amended affidavit of merits filed December 8, A. D. 1928. 18. 31.
- Order continuing motion to vacate judgment to December 15, A. D. 1928.
- 23. Order denying motion to vacate judgment and order for appeal. Bond \$2,500 in thirty days and bill of exceptions in sixty days.

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Opinion filed Nov. 6, 1929

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In the trial court on the motion of the claim? the claim from the that we are an order entered striking defends from the record for each of a sufficient afficient of derivits of deriving and defendant appeals.

true for the state of the ellegal error of the trial court at the trial to trive the state at the state acritorious defense.

The difficulty with this cose is that the abstract boing the pleeding of the artise, does not resent my mater for review by this court. The abstract is as follows:

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exceptions in strey days.

Appeal bond with the Metropolitan Casualty Insurance Company, New York, as surety filed and approved.
 Gertificate of clerk of Circuit Court.

It will be observed that the foregoing is simply an index to the record. The praccipe does not state the nature of the action. The reference to the declaration is negative, it brings nothing before us, because neither the declaration nor any averment of it is abstracted. Neither has counsel abstracted the affidavit of claim; the summons does not even state the nature of the action. What the pleas and affidavit of merits were the abstract does not show. What was contained in the amended affidavit of merits filed December 8, 1928, does not appear in any form. Nothing regarding the contents of the amended affidavit of merits is abstracted. In this condition of the abstract. nothing is brought to this court for review. The abstract is the pleading of the parties. The court will not go to the record to reverse the judgment, although it will go to it, if necessary, in an effort to affirm the judgment. In this condition of the abstract there is nothing left for this court to do under its rules but to affirm the judgment below. In Chicago Record Herald Co. v. Fred Bender S. F. Co. 207 Ill. 152, This court held in an opinion by Mr. Justice McSurely, that the abstract is the pleading of the parties and must be sufficient to apprise the court of the points which it is claimed necessitate a reversal. The abstract in this case does not apprise the court of anything which occurred in the court below reviewable on this appeal. An abstract which is merely an index, as in the instant case, and does not give any suggestion as to what the action is about, is insufficient.

From the briefs of counsel it does appear that plaintiff's suit was an action to recover rent, and the only point suggested in this appeal is that the trial court erred in holding 25. Appeal Found at the terrapolitan Charatty Insurance Compuney, New York, as surety filled and approved.

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that the affidavit of merits was insufficient, and in not giving leave to defendant to file an amended affidavit of merits. As the affidavit of merits is not abstracted in the record we are unable to say whether or not the court erred in holding it insufficient, as not stating a defense. Neither the abstract nor the record show that an amended affidavit of merits was filed by leave of court, the one found in the record being inserted on a motion to vacate the judgment appealed from, which motion the record shows was denied. Nothing relating to the amended affidavit or the motion appears in the abstract. So far as the abstract of the record is concerned, if there ever was a blind case brought to this court, this is that case.

Moreover, as held in Norn v. New & Gintz, 63 Ill. 539, in order that the court may review the action of the court below overruling a motion to set aside a default, the motion with the affidavit in support thereof must be preserved in the record by incorporation in the bill of exceptions signed by the judge and properly certified by the clerk. No bill of exceptions is found in the record in this case. People v. Ostrowski. 307 Ill. App.144; Union Bank of Ean Claire v. Milhenning, 246 ibid. 169, in which it was held that a deposition used upon the trial should be included in the bill of exceptions and not in the common law record.

As the abstract of record filed in this appeal is barren of any matter which calls for our review, the judgment of the Circuit Court is affirmed.

AFFIRMED.

WILSON, P.J. AND RYNER, J. CONCUR.

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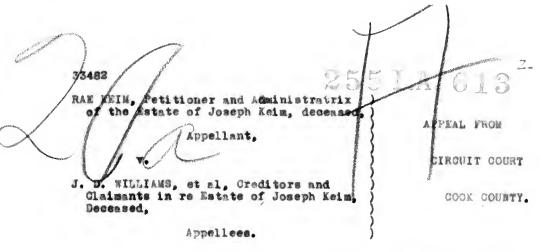
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Opinion filed Nov. 6, 1929

MR. JUSTICE MOLDOM delivered the opinion of the court.

In the Probate Court of Cook County the appraisers appointed under the statute to appraise the amount of the widow's award in the estate of Joseph Keim, deceased, appraised the same at the sum of \$2500. Rae Keim, the administratrix, presented her account to the Probate Court, in which she took credit for the \$2500, widow's award, and for \$500 for her commissions as administratrix. On exceptions being filed to said two items, the Probate Court reduced the amount of the widow's award to \$1250 and her commissions as administratrix to the sum of \$350. There were also exceptions filed to the allowance of attorney's fees, which exceptions were overruled. From the order sustaining such exceptions the administratrix prosecuted an appeal to the Circuit Court. There was a trial on the appeal in the Circuit Court de novo, and the Circuit Court, in effect, affirmed the action of the Probate Court. From this order of the Circuit Court Rae Keim prosecutes this appeal.

It is assigned and argued for error that the Circuit Court erred in concurring in the action of the Probate Court in fixing the amount of the widow's award at \$1350 and her commissions at \$250, and it is further argued for reversal that the Circuit Court erred in denying Rae Keim a demand for a trial by jury.

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Opinion filed Nov. 6, 1929

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The salient facts in the case are, that the estate of the deceased Joseph Keim was insolvent, and that the total net assets collected by the administratrix amount to \$9300; that at the present time the assets will not pay to exceed forty to forty-five per cent of the amount of claims proven against the estate; that the family expense of the intestate's family for eight years preceding his death was about \$3600 a year, and that the family consisted of the deceased and his wife. The poverty of Rae Keim, the widow, is urged upon the court as a reason for reversing the order of the Circuit Court fixing the amount of the widow's award and her commissions as administratrix of her husband's estate in the same amounts as did the Probate Court. Unhappily those considerations cannot be taken cognizance of by the court as against the legal rights and claims of the creditors of her husband's estate.

In denying the widow's motion for a jury trial the court did not commit regersible error. This case is purely a probate matter, controlled by the statutes of this state. Such matters are not cognizable by the course of the common law. Therefore Section 68, Chapter 3, R. S., providing for trial by jury, has no application. In re <u>William Steele</u>, 65 Ill. 322, supports this diota.

In Doubet et al v. Doubet, 196 Ill. App. 289, the court said:

"But whether the name of the claim here is advancement or debt, appellant was not entitled to a jury trial. Heward v. Blacke, 53 Ill. 336; Martin v. Wartin. 170 Ill. 18; Maynard v. Richards, 166 Ill. 466; Coffey v. Coffey. 179 Ill. 383. It was the duty of the Probate Court in the first instance, and of the Circuit Court on appeal to, without a jury, determine whether there should be a deduction from appellant's distributive share of the estate."

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In Boyd v. Swallows, 59 ibid. 635, this court said:

"The court did not err in refusing to submit the question to a jury, for the reasons, first; the hearing was on exceptions to the pleadings as made, which, as a rule, present matters of law and not of fact, second, the proceeding was by way of citation, to compel the administrator to make a proper report and settlement of the estate, wherein the court exercises equitable or discretionary powers. The constitutional provision of a right of trial by jury; Sec. 5, Art. 2, does not apply to or limit the right of courts to exercise such powers. Flaherty v. HoCormack, 113 Ill. 538. It does not apply to the exercise of special summary jurisdiction unknown to the common law, and which does not provide for that mode of trial. Hard v. Farwell, 97 Ill. 614. It body secures such right in those tribunals exercising common law jurisdiction, in regard to matters wherein at common law said right existed. Petition of Ferrier, 103 Ill. 367. That right in no event pertains to other proceedings than suits at law. The proceeding is not a suit at law. In re William Steele, 65 Ill. 324."

In appeals from orders of the Probate Court in this state the hearing is de novo. The direct Court sits in the same manner as did the Probate Court. In the Probate Court Rae Keim was not entitled to a jury, and on appeal to the Circuit Court she gained no other right than that which the Probate Court possessed, and in denying her demand for a jury the Circuit Court did not err. As said in Trego v. Estate of Cunningham, 267 Ill. 367:

"It was not intended that a suit begun in one court should be tried by a jury and if begun in another court should be tried by the court alone."

See also Sebree v. Sebree, 293 Ill. 228.

It is provided by Section 76, Chapter 3, R. S. 1927, that the widow's award shall be subject to review by the court if unreasonable and unjust, and that

"The court may refer the same back to the same appraisers or may appoint other appraisers to fix such widow's award; or, on petition of the widow, the executor or administrator; heir, legatee or devisee, or oreditor of the estate, may hear evidence, and upon such hearing may increase or diminish such award as justice may require."

In Boyd v. drallown, 38 this. 875, this court seid:

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In reducing the amount of the appraisement of the widow's award the Probate and Circuit Courts acted within their jurisdictions pursuant to power conferred by the statute, supra.

In Section 76, Chapter 3, supra, it is provided that the court in fixing the amount of the widow's award should take into account the condition of the estate being administered. We think under all the circumstances of the case and the insolvency of the estate, the Circuit Court was justified in fixing the amount of the widow's award at the sum of \$1250. The rate at which the deceased lived may account for the insolvency of his estate, and the court in the exercise of its judicial discretion had a right, under all the circumstances, to fix the allowance of the widow's award at the sum which it did.

Coming to the action of the Circuit Court in fixing the allowance of the administratrix' commissions at \$250, we think such action was fully justified, taking into consideration the fact that her lawyer attended to the collections, and that a creditors' committee assisted in so doing. If the administratrix is entitled to \$500, then the allowance to her attorney for fees would in equity and good conscience have to be reduced. The lawyer did the work, the court heard his evidence and concurred in his claim. Under all the circumstances we are not prepared to say that the Circuit Court erred in fixing the amount of her claim for commissions at \$250. The allowance of administratrix' fees and of attorney's fees are clearly within the judicial discretion of the trial judge, and we cannot say that in either of the allowances made did the court abuse such discretion.

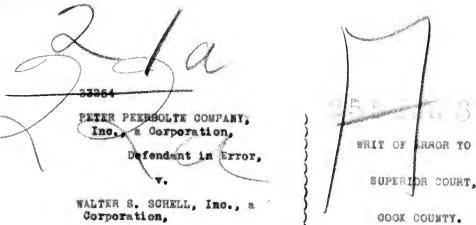
We find no error in this record warranting a reversal of the order of the Circuit Court appealed from, and it is therefore affirmed.

AFFIRMED.

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Plaintiff in Error.

Opinion filed Nov. 6, 1929

MR. JUSTICE RYNER delivered the opinion of the court.

Under date of March 20, 1926 the defendant agreed to purchase from the plaintiff 10,000 bushels of Whenezer or Japanese onion sets, to be shipped "about first half of March, 1927." The order was in writing, signed by both parties, and just above their signatures appeared the following:

"Shipment is to be made in two-bushel burlap bags unless otherwise instructed sixty days previous to date of shipments. Peter Peerbolte Co. are authorized to use their best judgment in routing shipments unless specific instructions are given at least fifteen days prior to date of shipment.

Pounds Price per Bu. 32 2.75

10,000 Bushels Ebenezers
To be shipped F. O. B. Leading Station at Chicago.
Ship via. Will advise."

In the body of the order appeared the name and address of the purchaser as follows:

"Name: Walter S. Schell, Inc. P. O. Harrisburg, County. State: Penna. Ship to same."

The onion sets were to be grown and harvested during the season of 1926 by farmers with whom the plaintiff had contracts of purchase. The season for selling at retail and planting of onion sets is of short duration. It usually commences in March and ends sometime in the month of May of each year.

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## Opinion filed Nov. 6. 1929

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of onion sets out of the entire amount contracted for. From early in March until the latter part of April 1927, a number of letters and telegrams, relating to the delivery of the balance, passed between the parties. These documents clearly disclose that when the time for delivery arrived, the defendant had serious doubts about its ability to dispose of the sets ordered or to perform its contract. Under date of March 2, 1927 it wrote the plaintiff as follows:

"Peter Peerbolte Company, South Hobland, Illinois. Centlemen:

We have just received a very unexpected and very severe blow. Our Mr. Smith who has been calling on our customers in New York State has been compelled to resign his position because of his health especially and other personal reasons.

Because of the very unfavorable season the growers had in New York State last year they withheld ordering and our Mr. Smith expected to sell them the usual quantity about this time for they all claimed that they would not order until nearer planting time. Now we find ourselves without orders for these sets and without a salesman to sell them for us \* \* . We are going to make an effort to send our Mr. Ray V. Smith, who called on you, to New York State to solicit/these customers, but we have no idea as to how it will work out.

Under these dircumstances I am writing you this special letter to ask you to do anything in your power to relieve us of as many sets as possible and sell them elsewhere if you can, otherwise we would be facing a terrific loss, having no where towell these acts except in this section where we have been selling them and if Mr. Smith is not successful in moving them we do not know what we will do. We will make every effort to dispose of all of them we can or as many as possible \* \* \*.

Please treat this matter confidential.
Yours very truly
Walter S. Schell."

On March 7, 1927, the plaintiff replied by letter which was, in part, as follows:

"We are unable to help you out of this predicament as we have held this lot of sets in stock for you all this time and the way it now looks we will be unable to dispose of any more of these onion sets as most of the trade is supplied on this variety at the present late date. We will therefore have to look forward for shipping instructions on your congrect sets.

Thanking you for past favors and regretting our

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mer': . To' bedurts and armount and see to foo asse moine To early is wron until the latter part of toril 1987, a number of letters and telegrane, reketing to the delivery of the believes. passed inatedant the tracket. These discussions of each of the had suchmetch sit bester grows in ack amin of made sent bertaless with the religious of the contract of the sets ordered or to perform the contract. Mader date of March. I. 1987 it wrote tampilist on Thisainig out

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inability to help you out, we beg to remain, Yours very truly, Peter Peerbolte Co., Inc.

On March 16, March 22, March 23 and March 29, 1927, the plaintiff by letter or telegram demanded shipping instructions, warned the defendant that the time for shipment had arrived and that the defendant would be held responsible for all loss due to shrinkage or difference between the contract and market price, in the event of a resale. In several of its replies the defendant acknowledged its inability to dispose of the onion sets and asked the plaintiff to sell them at the best possible price.

Finally, in a second communication, on March 39, 1927, the plaintiff advised the defendant as follows:

"We are herewith enclosing confirmation of wire sent you today and wish to state that we are holding your sets, which we have milled, weighed up, and put back crates for your instructions. We will try hard to sell these sets if we have your instructions to do so, but we will expect you to stand in back of us should we be unable to dispose of same and also stand the difference between resale and the contract price of \$3.75 per bushel or \$3,00 per bushellif we sell them 7/8 inch.
"We trust you can see our position and that you will wire us sometime tomorrow just what you wish us to do with these sets. Thanking you in advance for same, we beg to remain,

Very truly yours, Peter Peerbolte, Pres. Peter Peerbolte Co., Inc."

On the same day the defendant replied by telegram which read:

"Answering wire this authorizes you to sell all our contract sets and charge to us loss if any. We have never yet broken a contract with any one and certainly will not with you. Our Mr. Smith will be to see you Monday."

According to the testimony of the plaintiff's witnesses no part of the 8014 bushels of sets remaining to be delivered under the contract was ever disposed of. The sets being of a perishable nature rotted and became wholly without value.

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On beach 16, 8 reb 71, were 23 and worsh 72, 1937, the ciaintiff by letter or telegral depend abipping inviruations, warped the defendant to a the time for abipment had arrived and that the defendant would be beld now contill or all loss due to shrinkers or fifference metress the continue and a rist prior, in the event of a really. In evertal of its replies the defendant canowledged its instillity to dispose of the enion setu end asked the visintiff to sell them at the best pastible prior.

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In the latter part of May, 1987 the parties opened negotiations to adjust their differences. A representative of the defendant testified that the president of the plaintiff orally agreed to seept 5,000 pounds of onion seeds in full satisfaction of the plaintiff's claim for damages. The president of the plaintiff testified that he demanded the payment of \$5,000.00 call in addition and that no definite agreement was arrived at.

The real understanding, or perhaps it might better be termed misunderstanding, of the parties is, however reflected in the letters and telegrams exchanged between them. On May 31, 1927 the plaintiff telegraphed the defendant as follows:

"Find we can use seed up to 5,000 pounds J. P. Red and Yellow grown by Morse Send by freight to Lansing via Penna religious immediately stop will credit your account with same at One Pollar per pound Answer

Peter Peerbolte Co. Inc."

On June 3, 1927, the defendant replied by telegram that
"We are shipping onion seed today as instructed.
Walter S. Schell. Inc."

This telegram was confirmed by a letter two days later in which the defendant said:

"This seed must be accepted with the understanding that this represents the full amount of allowance that we will make on our contract with you for onion sets."

## and also

"It is our sincere opinion that we are acting most liberally with you in offering to furnish this seed to you under these circumstances."

Then followed a letter from the plaintiff dated June 11, 1927, stating:

"The shipment of seed arrived this morning. We are accepting the seed as per our wire and your confirmation of same of which we are enclosing copies. We certainly are suprised at the attitude you take in the matter as per your letter of June 4 \* \* \*. We have always been fair with you people and we want to be fair now, therefore we

In the latter part of asy, 1877 the parties errord new negotiation of the rations to of asy their differences. A representative of the defendant the defendant of the plaintiff or and to story that is, and to story that if the plaintiff of the for "ranges, the provident of the plaintiff terminal that the the demanded the represent of the plaintiff terminal that the the demanded the regression as the parties appears of a stirt with the finite appears the actions and the appears the

the real anderstanding, or perhaps it might better be tested of tested always rationaled. Since is, however rationaled in the letters and telegraphed the defendant as follows:

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make the following proposition: We take the onion seed which is worth \$5,000 and you mail us two checks for \$2500 each one dated July 1st and one dated August 1st. We think we are going the limit in making this offer and we are taking enormous losses. This is absolutely the best we are going to do. Please let us know at once whether or not you accept this proposition. If not we will have to take legal action. However, we trust this will not be necessary as we do not like to take this action."

On June 14, 1927 the defendant replied by letter, in part, as follows:

"You are asking us to do certain things without ever having given us any statement showing any loss whatever. To arrive at a definite settlement we should have had before we shipped you this seed, a complete list of all your sales showing the amount you realized on every shipment covering the sets which you advised us you had reserved for us in your Wisconsin warehouse and which sets were all sold " " ". As stated in our previous letter, if you are not willing to accept this seed in full settlement of our controversy then please return it."

The 5,000 pounds of onion seeds arrived at Lansing, Illinois on June 11, 1927. On June 17, 1927 the plaintiff instituted suit in assumpsit in the Superior Court of Cook County against the defendant. On the following day a wirt of attachment in aid was issued by virtue of which, on June 20, 1927, a levy was made upon the 5,000 pounds of onion seeds. A jury trial was had, resulting in a verdict in favor of the defendant on the issues raised by the attachment in aid and a verdict for the plaintiff on the assumpsit issues. Judgment was entered on each verdict. The plaintiff was granted an appeal but did not perfect it. This is the appeal of the defendant from the judgment entered in the assumpsit proceeding.

The first point urged as a ground for reversal of the judgment of the trial court is that the plaintiff was not entitled to recover the contract price because the title to the onion sets had not passed. This argument is based upon the contention that the goods being unascertained at the time of make the following proposition: a tere the ont in seed which is seet to see the following you will be see the for ablied in section one detect that and out detect is out to the link and out detect of the section of the section.

On June 14, 1887 to defendent replied by letter, in mart, as fallows:

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the making of the contract, the evidence failed to establish an appropriation of the goods to the contract, within the meaning of the Uniform Gales Act of this state. But there was evidence tending to show an appropriation of 8,500 bushels of sets which presented an issue of fact for the determination of the jury. The amount of the verdict shows that the jury found an appropriation to this extent. In addition to this, a setting aside of the entire amount to be delivered would have availed nothing. Before the time for delivery arrived the defendant was entreating the plaintiff to do all in the plaintiff's power to relieve the defendant from the obligations of a burdensome contract. It was unable to sell any of the onion sets. It wanted no further deliveries and requested none. Finally, it authorized the plaintiff "to sell all our contract sets and charge to us loss, if any".

In connection with the same point it is contended that while the court erred in admitting in evidence the correspondence between the parties, the letters and telegrams show "that the parties thereby practically entered into a contract that the plaintiff should undertake to resell the onion sets at the best price obtainable and hold the defendant only for the damages resulting by way of loss from such resale."

The latter contention appears to be sound in fact and law. There is nothing in the Uniform Sales Act prohibitive of such an arrangement. This being true, the only issue of substance presented by the record is whether the plaintiff fulfilled its undertaking to try to sell the sets. The plaintiff's proposition of March 39, 1927, was that it would "try hard" to sell them but that it would hold the defendant liable for the difference between the resale and the contract price. On the

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following day the defendant telegraphed its acceptance. Properly construed the agreement, created by the letter and telegram, was that, in the event the plaintiff could not dispose of the sets, the defendant was to be liable for the full contract price.

In its affidavit of merits, verified by its secretary, the defendant among other things, stated that it

"admits that plaintiff was ready and willing and tendered and offered to deliver said onion sets to the defendant on the first of March, A. D. 1927, and admits that the plaintiff then and there requested it to accept the same and to furnish shipping instructions as to where said onion sets should be shipped, but defendant denies that it was then and there requested to pay therefor; the said defendant further states that after the plaintiff had requested it for shipping instructions and after defendant had failed to furnish the same, the said plaintiff at the request of said defendant, sold or otherwise profitably disposed off said onion sets it was so holding for defendant aforesaid."

Upon the trial of the case counsel for the defendant moved to expunge from the affidavit the words:

"Defendant admits that plaintiff was ready and willing and tendered and offered to deliver said onion sets to the defendant on the first of March, A. D. 1927, and admits that plaintiff then and there requested it to accept the same and to furnish shipping instructions as to where said onion sets should be shipped."

The action was denied and properly so. The court then permitted the attorney who prepared the affidavit to testify that when he prepared it he was not familiar with the facts except from the correspondence; that he did not communicate with Charles M. Storey who verified the affidavit and that he did not intend to make the admissions contained in the words sought to be expunged. In this we think the court erred. The secretary of the defendant should not have made the affidavit and it should not have remained on file until the trial offthe case if it did not speak the truth. But it is pointed out that the affidavit was filed with the pleas to the original counts of

foliowing day the defendant telegraphed the acceptance. "To erwity construed the accesses, orested by the letter and telegrand as that, in the event the plaintiff dould not dispose of the sets, the defendant was to or liable for the fail contract price.

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the declaration and that additional counts were afterwards filed, raising different issues, without an affidavit of claim and without requiring a further affidavit of merits. This, however, does not change the character of the affidavit as an admission that the plaintiff was ready and offered to perform within the time provided for delivery under the contract, that the defendant failed to furnish shipping instructions and finally that the defendant requested the plaintiff to sell the "onion sets it (the plaintiff) was holding for defendant."

Finally counsel for the defendant say in their brief that,

"It is clear from the evidence in this case that in the first half of March 1937, which was the time provided by the contrast for delivery, the goods might readily have been resold at a reasonable price."

But the defendant in its letter of March 5, 1927 and in its affidavit of merits took the position that the contract did not call for delivery until the latter part of March 1927. This is contrary to the express provisions of the contract but it shows the desire on the part of the defendant to have delivery delayed. It was not until March 30, 1927 that it took any definite action. Upon the insistence of the plaintiff it authorized a sale of all the onion sets, the loss to be charged to it.

Whether the plaintiff could have sold the sets after it received authority so to do, presented a question of fact for the jury. The president of the company testified that he could not sell them and that at the end of the season the plaintiff had about 10,000 bushels of sets of its own which it was unable to dispose of. He further testified that he authorized a representative of the defendant to sell under the name of the plaintiff and furnished him with order blanks for that purpose.

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This was admitted by the defendant's witnesses.

It is next urged that the court committed reversible error in instructing the jury that, under the contract, the defendant was required to give shipping instructions before the plaintiff could be called upon to perform its part of the contract. Much refinement of reason is indulged in about the proper construction of the contract and particularly as to the meaning to be given the words at the bottom of the contract "Will advise" inserted in the handwriting of the president of the defendant company, after the words "Ship via." The president of the plaintiff testified that in the trade these words meant that the purchaser was required to give shipping instructions. This was not denied by anyone, but it is contended that the plaintiff failed to lay a proper foundation for proof of a custom. The point is without merit. We assume that the words "Will advise" when used in connection with the words "Ship via" mean that before the seller shall be required to perform he is to receive from the buyer instructions of some kind pertaining to shipment. In fact this was the construction adopted by the parties. The plaintiff was repeatedly demanding shipping instructions and the defendant, in several of its replies, promised to give them at a later date. This was admitted in the defendant's affidavit of merits. But whatever be the correct interpretation of the contract, it suffices to say that the plaintiff was not at any time called upon to perform its part of the contract because the defendant was continually advising the plaintiff that it (the defendant) did not want the onion sets delivered. If there was error in the giving of the instructions it was haraless.

One of the defenses interposed by the defendant was an accord and satisfaction. It is clear from the correspondence,

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however, that the 5,000 pounds of onion seeds were never accepted in satisfaction of plaintiff's claim for damages. The plaintiff ordered the seed saying that it would credit the defendant's account at one dollar per pound. The defendant replied by telegram that it was shipping the seed as instructed. The subsequent letter of the defendant that the seed "must be accepted with the understanding that this represents the full amount of allowance that we will make on our contract with you for onion sets" could not bind the plaintiff because the plaintiff promptly advised the defendant that this condition was not acceptable.

because no credit was given for the five thousand pounds of onion seeds which were valued by the parties at \$5,000.00. The basis for this contention is that the plaintiff accepted and agreed to pay for the seeds and that the verdict of the jury upon the attachment issue establishes that fact. With this contention we cannot agree. The verdict and judgment in the assumpsit case are in favor of the plaintiff. The only question before us is whether the judgment should stand. Furthermore the defendant should not be permitted to assume the inconsistent position of claiming that the onion seed was accepted in full satisfaction of the plaintiff's demands and in the alternative that credit should be given ofor its agreed value.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

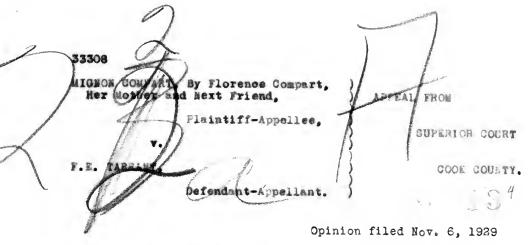
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MR. JUSTICE RYNER delivered the opinion of the Court.

The plaintiff, a minor, brought suit, by her next friend, in the Superior Court of Cook County, to recover damages for an injury to her leg resulting from a large cement wase or flower pot falling upon it, while she was upon the premises of the defendant. The jury returned a verdict in her favor and assessed her damages at \$500.00. The court entered judgment upon the verdict and the defendant appealed.

There is no substantial dispute of facts as to how the accident happened. The defendant was the owner of a threeflat building facing upon Sheridan Road in the City of Chicago. The front of the building sat back 39 feet from the front lot line. There was a concrete walk leading from the sidewalk 56 the front of the building. At the end of this walk eight concrete steps lead up to the entrance of the building. On one side of the steps was a concrete banister about one foot in width and at an incline the same as that of the steps. At the bottom of the bannister was a pillar made of brick and concrete. about one foot square at the top and about 31 inches in height. The wase in question rested on the top of the pillar. It was made of sandstone and was of ordinary design. It was eleven inches in height, twenty inches in diameter at the top, eleven inches in diameter at the base, and weighed 110 pounds. It was not fastened to the pillar.

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Defendant- . wellent.

Opinion filed Nov. 6, 1929

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No error has been assigned as to the amount of the damages. We find no reversible error committed by the trial court in its rulings on the admissibility of evidence or in the giving or refusing of instructions. The plaintiff at the time of the accident was five and one-half years of age and therefore could not be charged with contributory negligence. The only question left for our consideration is whether the defendant violated some duty he owed to the plaintiff which should render him liable to respond in damages for the injury sustained by her.

upon the premises of the defendant to play, at the request of one of the children of a tenant of the defendant. It appears from the evidence that children in the neighborhood were in the habit of congregating and playing on the front steps and in the hallway of the defendant's building. They caused some annoyance to the occupants of the building by ringing the doorbell, sliding down the banister and making noises in the hallway. They were repeatedly told to play in the backyard. This they generally declined to do. On the day of the accident, the defendant, his wife, his son, and the janitor of the building told the children, including the plaintiff, not to play on the

a tempor of the defendant has three suit children, the plaintiff cas in the hapit of claying with them, and, on the day the speldent had not be classiff and a versionally object and circumstant of the classiff and appearable. A number of the children, just before the courts is communicated at the children, just before the courts is communicated that the basishes the court and the basishes the right of the battom until the same and and the the room of the court and south the the room of the court and south the plaintiff a lag.

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front steps. They, however, continued to slide down the banister until the accident happened. It does not appear that the defendant, or anyone representing him, warned the children of any danger.

The vase in question was placed there by the contractor who constructed the building. The defendant testified that it had been in the same place and condition for four years immediately preceding the date of the accident. This testimony was not contradicted by any witness. There is no evidence that either the vase, or the pillar upon which it rested, was, in any particular, defective in construction.

Although the declaration contained a count charging the defendant with maintaining a nuisance attractive to children, counsel for the plaintiff in his brief says that he did not in the trial court, nor does he in this court, rely upon the doctrine relating to attractive nuisances. The vase was not inherently dangerous to adults or to anyone making proper use of the defendant's premises.

The law is well settled that the owner of property owes the duty of exercising a higher degree of care to protect children of tender years, who are unable to detect and protect themselves from danger than adults. The youth of a child, however, does not supply the lack of negligence on the part of the owner. As was said in Belt Ry. Co. v. Charters, 123 Ill. App. 323.

"The duty which the law imposes upon the defendant and the omnission of which is actionable negligence is not affected by the age of the plaintiff. His youth does not supply the lack of negligence upon the part of the defendant. He cannot recover unless there was negligence upon the part of the defendant which caused the injury."

front seeps. They, herefore, continued to side down the braister ratil the rapidant har eard. If does not prest that the defendant, or rayone sepreserting him, marked the religion of any danger.

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Weither is the owner liable if another and independent element of force intervenes which breaks the relation of cause and effect so that the supposed negligence of the owner is not the proximate cause of the injury. This rule was announced in the case of <u>Anderson</u> v. <u>Karstens</u>, 318 Ill. App. 385, where the plaintiff relied upon the doctrine of attractive nuisance. The principle announced, however, is applicable to the instant case. The court said,

"This case, as we view the evidence, discloses that there was the intervention of another and independent element which broke the relation of cause and effect and the supposed negligence of defendant was, therefore, not the proximate cause of plaintiff's injury. This intervening cause in this case was the act or acts of other lads who carried the cans from defendant's lot into the alley, poured the contents of one can into the other and then applied the lighted matches which directly brought about the explosion."

as to the preximate cause of the accident was one for the jury to decide. This is generally true, but, where the facts are undisputed, the verdict of a jury will not be permitted to stand where the evidence fails to show or tends to show negligence on the part of the defendant which was the proximate cause of the accident. Kmaus v. Southern Ry. Co. 245 Ill.

App. 192. In that case the court said:

"Appellee argues that the question of proximate cause is a question of fact for the jury. While that is true, ordinarily, yet if it clearly appears from the undisputed evidence that the damages suffered may not, by any fair process of reasoning, be attributed to the negligence charged, it becomes a question of law."

Considering all of the facts in the record in a light most favorable to the plaintiff, we fail to find proof of any act of negligence on the part of the defendant which could by any fair process of reasoning, be considered the

sather is the same if able if no ber and independent element of force intervenes which browse the same is not and effect so that the samewest negligouse of the orange is not the provise to cause of the injusy. This rate was unounced in the case of military. I stissue, is ill. pp. 285, at it the plaintiff relied woos the doctrine of effective nuternoe. The orientalise encounced, however, is applicable to the instant case. The court said,

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proximate cause of the plaintiff's injury.

For the foregoing reasons the judgment of the Superior Court of Cook County is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

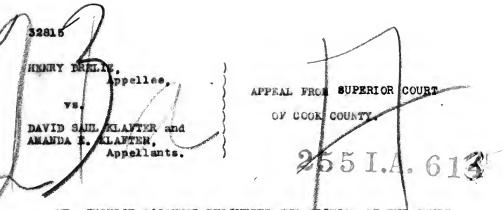
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sor the foregoing remoons one jurament of the Superior forth of Cook County is revered and the order remanded.

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MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On February 11, 1929, we filled an opinion in this case where we reversed a judgment for \$22,858.91 rendered in favor of the plaintiff and against the defendants in an action of assumpsit. We there held that plaintiff could not recover under the law and in concluding the opinion we said: "It follows that the judgment of the Superior court of Cook county must be reversed but, since there is no dispute as to the facts, it will not be necessary to remand the cause."

The record discloses that on the trial both parties introduced evidence and at the close of all the evidence plaintiff moved the court to instruct the jury to find in his favor and the defendants moved for a similar instruction in their favor. The court denied the defendants' motion but sustained plaintiff's motion and directed a verdict for the plaintiff, upon which judgment was entered. In this court the defendants contended that the court should have directed a verdict in their favor as requested, and this contention we sustained. The case was taken to the Supreme Court on a writ of certiorari and on October 19, 1929, the Supreme Court handed down an opinion reversing the judgment of this court and remanding the cause to this court "with directions either to affirm the judgment, or if there was error in matter of law requiring a reversal, which error can be corrected on another trial, to remand the cause and order that the error be corrected, or, if

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EN. JUSTICE C'UCAGOR PALIVERED DES CELLUS OF THE COURT.

Oss Pebrary 13, 1929, we filled an opinion in this case where we reversed a judiment for \$52,550.91 rendered in favor of the minimit; and against the defendants in an action of assumption. We there not have plaintiff could not reserve under the law and in concluding the opinion or antic; "It follows that the judiment of the buparter ocurs of John a sing the first in no dispute in the little fill reversed but, since there is no dispute in the little not be assumed to remaind one course."

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a finel judgment is entered, that the ultimate facts found difthe ferently from the facts as found by Superior court shall be incorporated in the judgment."

The ultimate fact which we found different from the Superior court was that the title to the premises fronting on Route 3 was not materially defective. Upon a consideration of all the evidence in the record we came to that conclusion as a matter of law; there being no dispute in the evidence, but one conclusion could reasonably be drawn from it.

fact for the jury to decide but that the sole question involved was one of law for the court and accordingly directed a verdict. We were also of the opinion that there was no question of fact for the jury - that the sole question was one of law for the court - but that the court reached a wrong result under the law. In Devine v. Rosenbaum Bros., 192 Ill. App. 30, another division of this court held that the written document was ambiguous and therefore evidence was admissible to explain its meaning; but on a review of this case by the Supreme Court, 271 Ill. 354, it was held that the document was unambiguous and that the evidence was inadmissible. That case is a precedent, if any is needed, for what we did in the instant case.

Fe are entirely satisfied with the opinion heretofore filed by us in this case, and for the reasons therein stated the the judgment of Superior: court of Cook county is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Resurely, P. J., concurs.

Matchett, J., dissents.

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FINDING OF FACT.

We find as an ultimate fact that the title to no part of the premises fronting on Route 3 was defective and that the defendants, the sellers, were able to furnish good title thereto.

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To find as an altimate fact that we think no part of the part of the oremises stocking on Roste 3 sas defective and that the defendance, the cellers, were only to surpless good, its thereis.

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JULIUS PRINDMAN, Administrator of the betate of Men Manfield, Deceased.

Appellee,

FROM CIRCUIT COURT.

COCUTORY APPEAL

GOOK COURTY.

JOSEPH PECKLER, (Impleaded with MODERN WOODMEN OF AMERICA, a Corporation),

Appellant.

Opinion filed Wednesday, Nov. 27, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Julius Friedman, as administrator of the estate of Ben Manfield, Deceased, filed his bill of complaint, charging that Ben Manfield died April 16, 1929, leaving certain heirs at law and that complainant was duly appointed administrator of his estate May 6, 1929; charges that there was a certain policy of insurance issued by the defendant, Modern Woodmen of America, a fraternal benefit society, incorporated under the laws of the State of Illinois; charges further that prior to his death, said Sen Manfield and the defendant, Joseph Peckler, entered into a certain written agreement (which is set out in full in the bill of complaint) under which the said Manfield agreed to and did name the said defendant Feckler as beneficiary in and to said policy of insurance. Said agreement further provided therein that the said Peckler covenanted and agreed that upon the death of the said Manfield and upon the payment to him of the amount due under the policy, he would immediately pay it over to the executor or administrator of the estate of

JULIUS ALEBRAS, A SMINLESENDOR OF the Estate of Men Senfleys. December.

WOLLDON'S

JOSEFH PROVIDER, (Impleaded with wooden Forence of Authors, a Corporation).

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Opinion filed Wednesday, Nov. 27, 1929

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Julius trieduca, as administrator of the estate of Ben Menfield, Derensed, filed his bill of dampisint, obsering thet dea woulted died optil 13, 1989, leaving certain being - recertaining beinings one duly oppoint that the relief of his sames way S. 1800, charges they there was a certain policy of lastrance leaned by the defendant, bodern vegder of Emerica, a fratarnal behelf t society, incorporated under the larg of the State of Hillmole; charges further that prior to his doath, said hes invileld and the usiondart, leasth Problet. eno los el delevi ilienesta - nelitra nilotro a cini beretre biglitas bice odd deeda concentation to ille add all ille at greinilered as religed factorist bins out once hit has of beerge in and to eald policy of tueursnee. Earl eggeenent furtier Tourise has hedranerous talken the edi take aforest besirety theory of men, bee bletters fire and to diene add according to him of the amount due under the policy, he would accedentally pay it over to the executor or austriation of the estate of the said Manfield; charges further that the said defendant,

Peckler, has repudiated the terms of said agreement and has

repeatedly stated that he would not carry out its terms; charges

further that the said defendant, Peckler, is in straightened

and impecunious circumstances and has no property on which an

execution could be levied in the event a judgment was rendered

against him; charges further that complainant is informed and

believes that a check is to be delivered to said defendant,

Peckler, on the second day of July.

The application for this restraining order was made July 1st, the day before the event, as charged in the bill, was to take place. The affidavit filed in support of said bill charges that in view of the shortness of time, it would be impossible to prepare and serve notices of the application for said injunction and that in the event defendant should be so notified, he would immediately take steps to try to collect said money due under said policy of insurance.

On motion the court entered an order restraining the defendant, Peckler, from collecting, and the Modern Woodmen of America from paying, any money due under said policy until the further order of the court, it appearing to the court that no damage would accrue to either of said defendants by reason of the insumance thereof.

The defendant, Modern Woodmen of America, have not joined in the appeal from the interlocutory decree and are not complaining of the decree of the court granting the restraining order. It was served with notice of the proceeding. No specific assignment of error appears as to the issuance of the injunction as to the defendant Modern Woodmen of America.

the suid danishing charges for her the set defendant, feekles, has reportedly stated that he would not overy out the serve; charges that the role he would not overy out the serve; charges first out that role defendant, Peckler, is in etralphiened and imprevalent out of constance and has no property on this an exemption and he in the respect of the related exemption and he interest out the related and exemption that the respiction of it informed and believes that a choract is informed and believes that a choract is informed and believes that a choract is informed.

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Moreover it appears from the Brief of Peckler in General Number 33956, a subsequent appeal in the same cause, that the money has been paid into court, under an order of the Chancellor, on motion of the defendant Modern Woodmen of America.

It is urged that the allegations of the bill of complaint and the accompanying affidavit, did not warrant a court of equity in issuing an injunction without notice; that there are no allegations in the bill, from which the court could find that complainant would be unduly prejudiced if the injunction did not issue forthwith without notice; that the injunction should not have been issued without first requiring complainant to give bond in accordance with the statute.

confining this opinion merely to the question as to whether there were sufficient allegations in the bill of complaint to justify the court in issuing the injunctional order, we are of the opinion after a reading of the bill and the affidavit that there were sufficient allegations of fact set forth in the sworn bill and affidavit to justify the court in ordering the injunction to issue without notice, and further, that there were sufficient facts stated together with the finding of the court in its decretal order, that would justify the granting of the application for the restraining order without bond by the complainant.

For the reasons stated in this opinion, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

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MORRIS ROURNBAUM et /al.,

LEZA SAPOZNIK and MORRIS SAPOZNIK et al., Appellants. STERLOGUT AN APPRAL PROP CIRCUIT

255 I.A. 614

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Complainants on June 27, 1929, filed a bill against Leza Sapoznik et al., to foreclose a trust deed which conveyed certain presides to secure as indebtedness of \$17,600. The bill alleged that the premises were also encumbered by a prior first mortgage given to secure an indebtedness of \$65,000. It also alleged the insolvency of the debtors and that the premises were inadequate security for the indebtedness.

Chicago Title & Trust Company receiver with the usual powers. This order directed that the complainants file their bond in the sum of \$500. Subsequently the receiver filed its acceptance of the appointment and thereafter orders were from time to time entered authorizing the employment of counsel and directing that certain defendants show cause why they should not be punished for contempt; that certain payments be made by the receiver and that a writ of asseistance issue in its favor against some of the parties.

Certain defendants answered the bill and filed a cross-bill, to which answers were filed.

Thereafter Clarence L. Coloman filed a bill to foreclose the first mortgage, and upon his motion an order was entered on September 18, 1929, which provided that the receivership should be extended "to cover the lien of the Trust Deed as security for the principal note and interest coupon notes sought to be fore-

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Certain defendant makered the bill and thed a erose-bill, to which amerors erre filed.

Massenter Carense L. Colonau tited a bill to foreclose the first mortgage, and upon his action an order was entered
on September 18, 1910, which missing the the receiveranty should
be extended to cover the lien of the fruze. And we necurity for
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closed" in that case, "which upon good cause shown, after a full hearing, the complainants therein are not required to give bond."

On October 15, 1929, the bond for appeal to this court was filed, and it is now contended that the order of July 1, 1929, was erroneous because a complainants' bond was not filed in accordance with section 55 of the Chancery act and that the clause in that order relative to the complainants not being required to give bond was erroneous upon the authority of Sherman Park State Bank v. Loon Office Bldg. Corp., 238 Ill. App. 450, and Davis v. Blair, 252 Ill. App. 417.

It must, we think, be conceded that the order of July lst did not meet the requirements of the statute as interpreted by the decisions cited with reference to the bond to be given by complainants. However, the thirty days within which an appeal might be perfected from that order had expired before this appeal was taken, and we cannot agree with the contention of defendants that the entry of the order of September 18th, giving other and further powers to the receiver already appointed, opened up the matter and operated to extend the time within which this appeal might be brought. The provisions of section 122 of the Practice act with reference to the necessity of requiring a bond are not applicable to an order entered extending the powers of a receiver during the course of administration of the receivership estate.

The order is therefore not erroneous, and it will be affirmed, although complainants have not filed any brief.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

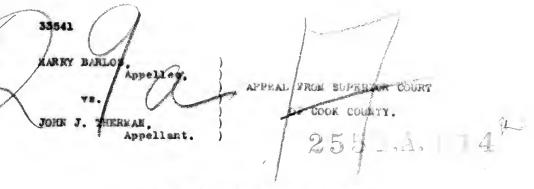
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MR. PRESIDING JUSTICE BARRES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in an action on the case, wherein the plaintiff sought to recover from defendants as his damages the value of a reasonable commission for the cale of real estate on the theory that they maliciously and wrongfully deprived him of his commission. Under the direction of the court two of the defendants, John P. and George P. Koelanias, were found not guilty. Appellant was found guilty and appeals from a judgment against him on the verdict for \$2,400.

not state a cause of action. In that we concur. In substance it alleges that in November, 1924, plaintiff was a licensed real estate broker with whom the property in question was listed for sale at a certain price subject to mortgages of record; that he submitted the same to John and George Moclanias (who are brothers and co-partners) and they verbally agreed to purchase the same on such terms after conferring in regard thereto with defendant. Therman, also a real estate broker; that a verbal agreement for division of commissions was then entered into between plaintiff and Therman in the event of a sale to the Moclanias brothers; that thereafter defendants agreed to meet plaintiff for the purpose of drawing up a written contract and failed to keep their promise, and smallciously and wrongfully contriving and intending to deprive plaintiff of his real estate cosmission failed and

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neglected to keep said promise and to purchase said rest estate, but en the centrary, without knowledge or consent of plaintiff submitted another person to the owner of said real estate, and said defendants wrongfully procured such person to enter into a written contract for the purchase of said real estate and to obtain title thereto for the use and benefit of defendants \*\*\* and concealed from and failed to disclose to the owner thereof and from plaintiff the fact that said purchase of said real estate had been made by said defendants for their said use and benefit.

The allegations in the declaration are almost identical in substance and character with those in the declaration in the case of Sansberry v. Salloway, 332 lll. 334, and rest upon the same theory, namely, that where through the agency of a real estate broker a prospective purchaser verbally agrees to enter into a written contract for the purchase of real estate on the owner's terms but fails to keep such promise and enters into an arrangement with another party or broker who negotiates the purchase in the name of a third person for the prospective purchaserise benefit and conceals the identity of the real purchaser from both the owner and the first broker and plaintiff is thus prevented from receiving a commission, a right of action on the case will lie against the second broker on the theory that he has wrongfully deprived the first broker of his commission. It was there held that the declaration did not state a cause of action.

As was said in that case, a verbal agreement to buy real estate is not binding, and a prospective purchaser has the legal right to refuse to carry out the verbal contract, if he sees fit, without incurring any liability to the agent for a cosmission. It is also true that no right to a cosmission from the owner would

segleded to keep said promine and to purchase with only of the bat on the contrary, things are northeder or parent of their iff substited acorded parent to the custoff of the substited acorded parent to the custoff and seed office, and affects contrart for the orthogonal of said real ristor and to be still title thereto "for the does not benefit of definituits condition that the fine the table is disclose to the contrart the said occupated from and falled to disclose to the contrart for the fact that said nucerics of dead contrart the said that said the table that the factor of the transfer that the december of the raid contrart the said that the first that the factor is in it said the table that the facility.

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accrue to the broker by reason of the mare failure of his customer to carry out a verbal promise to make the purchase. The acclanian brothers were under no legal duty to carry out their verbal promise to buy, and Therman, with whom plaintiff had no contractual relations, except for a division of the commissions in case of a sale to the Koclanias brothers, owed plaintiff no logal duty unless the sale was made to them or for their benefit and use.

Nor does the alleged agreement for a division of commissions have any bearing upon plaintiff's theory of Therman's liability for a tort. That the Moclanias brothers or Therman had the right to buy directly from the owner cannot be questioned.

(Hansberry case, supra, p. 338.)

Similar averments as to deceiving plaintiff, depriving him of his commission, paying it to another, purchasing from the owner for the benefit of him customer in the name of a third person, and concealing the fact as to the sotual purchasers, were held in the Hansberry case not to state a cause of action.

must be reversed and remanded because the declaration fails to state a cause of action obviates the necessity of discussing the evidence although we think appellant's contention that it does not support essential allegations that are contained in the declaration, is well taken in that it fails to show that the Koclanias brothers were able and ready to carry out the proposed deal or that it was ultimately closed for their benefit. On the contrary, the weight of the evidence shows that they were not financially able to carry out the deal alone and did not contemplate a purchase without enlisting the interest or co-operation of others, and that the sale was not for their joint use and benefit but for the use and benefit of one of them only together with said Therman and two other parties who had not been brought into the negotiations by

andree to the tracer by recent of the nore failure of his subject to corry out a verbal preside to eath the purchase. The archieles brithers were under no legal dary to carry out their verbal record to buy, and thereso, with them pickintist had no contracted relations, exampt for a division of the constitution in case it a sale to the healunian heaters, each plaintist no legal duty water.

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The conclusion, therefore, then the prigaration in the grains the mant to reversed und remainded because the decimentate fails to state to course of soften obvious the recessity of discussing the switches attended a trial to the continuence attended we think would not be united to the continuence deciment as an integrations than the facility that it real the continuence are than that the fails to correspond the proposed this is at the time contract that the continuence the case of the proposed this of the contract the sale of the contract the contract the contract that the sale of the contract the contract that the contract of the sale for their joint une that receive the contract of the sale of the contract of

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plaintiff. It was an essential fact to plaintiff's theory of liability in depriving him of a right to the commission that not only should be have sarned a commission by procuring a purchaser ready, able and willing to accept the seller's terms, but that the sale ultimately effected was made to, or for the benefit and use of, the same parties he had so procured. The evidence does not so show. Plaintiff, therefore, was not entitled to recover either under the declaration or upon the evidence adduced under the issues formed.

REVERSED AND REMARDED.

Scanlan and Gridley, JJ., concur.

piaintiff. It was an expected to since the theory of liability in depriving the of a right to the execution that the the execution the constant only energy has been averaged the second that the terms, but that the ready, which was rilled to second the terms, but that the ultimately effected was made to, or for the benefit and use of, the case parties to the had at the total of the second of the second and the second under the second the second and the lance address and and the lance formed.

CONTRACTOR OF THE SECOND.

Scanias and Oridier, J. , concer.

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AMERIL BATTERY CONTAINER OFFICERION, a corporation, Appellant,

Y .

SHYDER & HAY, Inc., a corporation, and the FORKMAN TRUST AND SAVINGS BANK, a corporation, Appellecs.

CIRCUIT COURT.
COCK COURTY.

MR. PRESIDING JUSTICE BARRES

DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree dissiszing for want of equity the original bill (filed by appellant and others) and granting the prayer in the cross bill of appellee Snyder & Hay, Inc., asking that appellee bank, a cross defendant, deliver to it \$15,000 which it had deposited in escrow with said bank pursuant to the contract hereinafter referred to on which complainant predicated its claim for relief.

Said contract was entered into May 7, 1927, between said Smyder & Hay, Inc., as the first party, and all of the shareholders and owners of the capital stock of two companies, appellant and the Bello-Byfield Corporation, as the second parties. By it all of said stockholders and owners gave Enyder & Hay, Inc., an option to purchase all of the capital stock of said two companies on or before July 2, 1927, for the price of \$300,000 in cash, to be paid to the second parties in proportion to their respective stock holdings. Pursuant to the terms of the contract all the certificates of the capital stock of said two companies were deposited, duly endorsed, together with a check of said Smyder & Hay, Inc., for \$15,000, in escrew with said bank. The contract provided that if for any reason, except as prescribed in paragraph 7 thereof, said first party should fail, neglect or refuse

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to exercise the option the \$15,000 should be paid by the bank to appellant as its own property, and said shares of stock be returned to the respective stockholders.

Paragraph 7 of the contract reads as follows:

"It is understood and agreed that in the event the net assets of the Ahlbell Battery Container Corporation upon the examination and inspection by the party of the first part are not of a value substantially equal to that shown upon the Company's balance sheet of February 28, 1927, said value to be determined by accounting principles now generally accepted and applied to corporation book-keeping by accountants, the said first party shall not be obligated to proceed, and that the Fifteen Thousand (\$15,000) Dollars deposited with The Foreman Trust And Savings Bank, as hereinbefore set forth, shall at the election of the party of the first part, be returned to it and the stock released unto said second party."

The original bill sought to have the bank pay over the \$15,000 to complainant and to deliver the certificates of stock back to the said several stockholders on the sole ground that Snyder & Hay, Inc. had wholly failed and neglected to excisise the option given in the centract. The cross bill sought the return of the \$15,000 to cross-complainant on the ground that the assets of complainant were not on the date of the contract or thereafter during the period of the option substantially equal to that shown by said balance sheet.

On stipulation of the parties after the hearing the certificates of stock were so returned, thus eliminating the parties of the second part to the contract from the controversy here involved, and the escrow (after allowances to the bank) was converted. into a certificate of deposit of \$14,772 which the decree ordered the bank to deliver to cross-complainant.

The main question presented is whether the proof adduced by cross-complainant was sufficient to support the finding of the master that the not assets of complainant corporation on May 7, 1927, (the date of the contract) or thereafter before July 31, 1927, (when the option expired) were not of a value substantially equal to that

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The original bill sought to dere the book pay or a the bill, coop the bill bed of the book and to the sold especial and to deliver the sold preum that and appears to the sold preum that had bed wrothy fathed and neglecter to enstand the option given in the contract. The error bill sought that the rother of the coopercompletenant on the ground that the ronate of the coopercompletenant on the ground that the rotate of the period of the period of the option about all with the period of the option substant his soul is that there by original waters there where.

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shown upon said balance sheet. In other words, appellant contends that cross-complainant did not prove its case by competent evidence. The asset, the value of which cross-complainant brings in question, appears on said balance sheet as "Bello-Byfield Corporation ......13,377.73," under the classification "Deferred Assets."

As tending to show that the said item had no appreciable value cross-complainant introduced in evidence conversations had in the course of its investigation into the assets of complainant with Marine Belle, president of both complainant and of the Belle-Byfield Corporation. Appellant's case rests mainly on the contention that these conversations were incompetent, irrelevant and not binding on appellant, and that without them no case was made for cross-complainant. In them, as testified to, Bello told crosscomplainant's vice president in effect that the Bello-Byfield Corporation had no assets and that it was just a device to hold contracts and some patents - "just a mere shell." So far as these statements are concerned a discussion of the contention is unnecessary. They may be wholly disregarded if the conversations so far as they pertain to the item in question were properly received in evidence. In such conversations that item became the subject of inquiry and discussion and Bello stated that it represented two contracts entered into between the Bella-Byfield Corporation, and two of its emplayees, one Boney and one Small, hereinafter referred to, which Bello thought had actual value. Under par. 3 of the contract it was agreed that cross-complainant as first party might make such investigation "as to it may seem advisable" not only of the books of account and records of both the Ahlbell and the Bello-Byfield Corporation but all other assets and to that end might use the services and time of their employes. Bello, being president of appellant and presumably acquainted with its assets, was unquestionably a proper person to

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complainant was privileged to consult him with respect to the character of appellant's assets and of what they consisted. The character of the item was not indicated on its face. Inquiry was necessary to determine to what it referred. Cross-complainant certainly had a right to rely on the statement of appellant's president as to what it consisted of in order to pursue its investigation as to its value. We think, therefore, Bello's statement was competent and binding upon appellant, whose property the \$15,000 was to become, under the terms of the contract, in the event cross-complainant did not avail itself of the option and was not justified in so doing under said paragraph 7.

In the conversations had cross-complainant's vicepresident questioned whether said two contracts had any value and Bello stated that he believed they had. There was no proof tending to establish that they did have any appreciable value - at any rate, any such value as given to the item on the balance sheet. On the contrary, to show that they had no value cross-complainant introduced in evidence the contracts and testimony of both Boney and Small, with whom they were made, with regard to their services thereunder. which clearly tended to show that they had no financial or potential value. The contract with each called for his services to the Bello-Byfield Corporation for a period of three years from July 1, 1926, at the rate of \$100 a week unless sooner terminated by mutual agreement. The services each was required to render were mainly of an experimental nature, namely, "to devise and improve as far as he was able such processes and methods of application in a commercial way as he is capable of in connection with any subject or investigation or experimentation that he may work upon." The contract also required that all processes and methods that might be developed thereby were to become the property of the Bello-Byfield Corporation, and

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with regard thereto to any other person. The evidence of Boney and Small disclosed that Boney continued in the employment under said contract until March 31, 1928, and Small under his contract until March 31, 1928, and Small under his contract until May 1, 1928; that while in such employment they took out no patents, made no assignments of any inventions or devices to the Sello-Byfield Corporation, and, in fact, made no inventions. Their testimony, therefore, tended to establish that the item in question possessed no real value - that in fact it represented nothing further than services that had been rendered for wages, the value of which, if any, would be embraced in some other assets. Their testimony tegether with proof of what the item consisted made out a prima facie case for cross-complainant sufficient to justify the finding with regard thereto and the decree in the absence of any testimony on the part of appellant to refute such proof.

It is argued by appellant that in the absence of any other proof as to what the assets consisted of on May 7, 1927, crosscomplainant failed to prove its case. Cross-complainant was not required to make proof of what appellant's assets consisted on that date or any other date. In the absence of any other proof the presumption would obtain that they were of the value represented on the belance sheet, but not that they exceeded such value. In our opinion when cross-complainant proved a deficiency of value in one item of over \$13,000 it devolved upon plaintiff to show, if it could, that there was a sufficient excess of value in the other items to meet such deficiency. In the absence of such proof we think the master was justified in finding on the proof aforesaid as to the item in question that the value of the net assets of appellant was not on the date of the contract substantially equal to the total amount as represented on the balance sheet. If the two contracts of which the item in question consisted had developed into nothing of value up to the end of the employment of Boney and Small.

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which continued for nearly a year in one case and more than a year in the other after May 7, 1927, (the date of the contract) then they certainly could not be said to have possessed any value on that date.

It is urged that cross-complainant did not elect to have the \$15,000 returned to it in a coordance with paragraph 7. It is sufficient to say that the mere fact that it did not avail itself of the option to purchase within the time prescribed therefor was sufficient evidence of an election not to exercise it. The contract provided for no specific notice or other form of election. Nor was cross-complainant's right under the contract to the return of the deposit affected by its delay to make a formal demand therefor until name days later. The dec ce will be affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

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SAM ROSENBURG et al.
Appellees.

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, Ltd.,
Appellant.

APPEAL YROM EIRCUIT COURT.

COOK COUNTY.

255 I.A. 615

MR. PRESIDING JUSTICE BARBES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment against defendant for \$41,911, the amount with interest for which plaintiff was insured by defendant against loss of merchandise by burglary. The declaration counted on liability under the policy for the full amount of the insurance. We question is raised as to such amount if there was liability under the terms of the policy. The main defense and the only argument on this appeal is that the alleged burglary did not occur in such a manner as rendered defendant liable under the terms of the policy.

Under the heading "Definitions" of the policy in question the following was provided:

"A. 'Burglary' as used in this policy shall mean a felonious and forcible abstraction by burglars of property insured under this policy from within the premises described in item 3 of the Declaration, after entry into such premises by burglars has been effected by the use of tools, explosives, electricity or chemicals directly upon the exterior thereof."

with the exception of a claim of error in excluding from evidence a certain document, hereinafter referred to, appellant's argument is confined to the single contention that the verdict and judgment were against the clear and manifest weight of the evidence

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SURICH SAMEAL ACCIDENT & LIABILITY IN SUBJECT COMPANY, LAC., Appellant.

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This appeal is from a judgment opened for endant for \$41.911. the amount ofth inforced for which plaintiff was insured by defendent against idea of neutrandise by burghery. The declaration counted as liability under the policy for the full amount of the incurance. We question is raised as to such emount if there was liability under the terms of the policy. The main defence and the only engages on this speed is those the liberal burghery did not seen is such a manner an rentree of the liberal liabile under the terms of the policy.

Under the heading "befinitions" of the rolley in question the following was provided:

"A. 'Surgiary' as used in this policy shall mean a falcaions and fercible abstraction by burglars of grapperty insured under this policy from which the the preparty insurabled to item 5 of the Declaration, after course into anong regulace by burglars and been effected by the same of tools, explants a clostricity or charge of directly upon the scenario thurses."

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in that plaintiffs failed to establish by a preponderance of the evidence that tools, etc., as referred to in said definition of burglary, had been directly used upon the exterior of the premises. The contention is that the provision referred to is unambiguous and to establish liability calls for proof of visible marks by the use of tools, etc., in effecting entry into the premises. As there is no contention of the use of explosives, electricity or chemicals the question is whether entry to the premises was effected by the use of a tool or tools upon the exterior thereof.

The evidence adduced by plaintiffs on that subject was given by one of the plaintiffs, A. P. Rosemberg and his nephew,

Joseph Rosemberg, the last persons to close the store at about 7:30

p. m., the night before the alleged burglary, and who returned to
the same about 2:45 the next morning on receiving notice of the
burglary a little over an hour thereafter, and a carpenter who the
afternoon of the same day repaired the door by which entrance was
claimed to have been effected, and which the evidence tended to
show was not changed in its exterior appearance in the interim.

The door in question opened inwards to said premises from a lobby of the building. It was connected with a burglar alarm so that on opening it the alarm was conveyed at once to the Illinois District Telegraph Company several blocks away. On receiving that alarm its nearest branch office was notified and a "runner" therefrom immediately went to the premises in question. The door was found to have been forced open in such a manner that the frame work and jamb alongside the door were pulled completely away from the wall. The bolt of one of two Yale locks thereon was protruding and had pulled away with it not only the frame work, which was hanging from the bell wire, but also the metal receptable into which the belt fitted. The receptable was lying on the floor. The door was

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in the pisitiffs filled to referred to in anti-definition of the epidemen the track of the epidemen the track of the effects and the definition of burghery, had been directly used upon the saferies of the presises. The contents a take the provinter referred to is amabiguous and to establish liability calls for proof of visible marks by the use of position of the feeting antily into the presises. A thore is an content of the presises where the question is whether eatry to the presises whe exfected by the use of a tool or books appeared;

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Joseph Hosenberg, the last persons to chose the store of the method feld p. m., the might before the olders burglary, and who returned to the same about find and ments of the mercially of received the the the burglary a little over an hour last-offer. M. and a enganter due the efferment of the same door by rided entrance and claimed to have been effected, and wided the entrance one claimed to have been effected, and wided the entrance one have been as the same course that the last of the latering the trace to the latering.

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pushed out of shape and could not be closed.

Hosenberg testified that he saw marks between the two locks, depressions; that they were cuts about an inch and a half in width and may be a sixteenth of an inch deep, more like a bite in the wood than a break; that these marks were alongside the locks of the door on the outside and had the appearance as if something had been pushed in there and pried over. The door was made of heavy, solid wood about three inches thick. He also testified that on the outside of the door about four and one-half or five feet from its base there was a mark about four and one-half or five inches in diameter "alongside of the part that opens up, above the bolt" which he described as having the appearance of a large sized indoor ball having been thrown against is wall that was wet. These marks were described as fresh and as not having been there before the store was closed up the previous evening.

A. P. Rosenberg testified "there were two looks on the door about six or seven inches apart and between these two looks there were marks from some instrument pressing against it, pressing against the side of the molding. Those marks had not been there before that time." As tending to impeach the Rosenbergs, there was introduced in evidence a written statement prepared the next morning by one Carentx, an investigator for defendant. The statement purported to be one by Joseph Rosenberg but was signed by him and A. P. Rosenberg. It gave an account of their closing the store the previous evening, of testing and having the alarm set in order, of having telephoned about the burglary and of their returning to the premises and discovery of the conditions there. In it was the stated ment, "there are no jimmy marks on outside of the door, or any other marks. It is the opinion of the police that door was broken open

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by some person pushing on door from outside." A. P. Rosenberg, when examined with regard to the statement, said that he called Carentz's attention to the same and that he said, "it is right if the door is broke, it don't make any difference." This was denied, however, by Carentz.

Johnson, the curpenter who was sent by the building authorities to repair the door, testified: "The front was marked like they had used some kind of bar or something but the door. It was marked in the door and the jamb, too. I had to put it all back and smooth it off. I had to smooth the door off a little where the worst mars were and then I had to stain it afterwards. Those marks looked like the marks of a bar up against the door and on the jamb. \* \* \* There was one big mark and several smaller marks. The big mark was just about right in between the two looks. It was a mark there, right into the jamb. The jamb of the door had a mark in from behind, from a kind of bar or jimmy, or something. \* \* \* The mark was about one-sixteenth or one-eight of an inch in the door and jamb there."

Damage to the interior of the door frame is admitted by appellant. Reliance, however, is placed upon the testimony of eleven policemen, who came to the scene shortly after discovery of the conditions, and that of said Carents, and Venash, auditor of defendant, tending to show that there were not any marks on the outside of the door indicating the use of an instrument or tool.

We shall not undertake to repeat all defendants' witnesses testified to upon said subject. In the main the testimony
bearing upon it was of a negative character, such as the witnesses
did not see any marks on the outside of the door nor any depressions
as though made by an instrument; that it was their opinion that the
door had been forced open from the outside by crowding it. The
value of their testimony on this point would depend largely on the

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by remained with regard to the statement, said .... us selectly when examined with regard to the statement, said .... us select the Carentes a attack to cald, "it is right if the door is abstrained to the same and thet to cald, "it is right if the door is abstrain, it don't wake any eleterance." This set device the however, by Carener.

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appallant. Mallanse, however, in places upon the teerange of every or eleven policeman, who came to the scene northy after the every or the conditions, and the test of owld service, and same up no like of defendant, breaking to shape the test came to the test of the construction of the construction of the construction in the construction of the

season to this or against the constraint of regards of the later of the control o

thoroughness of their examination, and to some extent as to the probability of their making such a close inspection as to discover such marks when they were also investigating the several evidences of a burglary, including those shown on a basement window and on a door leading from the outside of the building to the lobby, and the general conditions of disorder. It is hardly probable that the policemen made an examination with reference to determining liability under the policy. The value of their testimony was somewhat shaken by cross-examination as to the extent of their investigations of the premises and the conditions there found and the time they took for making them. And the testimony of defendants' two employes might from their interest be regarded as somewhat biased, thus leaving all of the testimony on the subject for the credibility of the jury. It is fundamental that the weight of the evidence is not to be determined by the number of witnesses testifying one way or the other, and that even though the evidence be such as to leave this court in doubt, the verdist will not be disturbed unless it can say that it was manifestly against the weight of the evidence. We are not prepared so to do, and that is the only question, except as to the rejection of certain evidence, that appellant argues on this appeal. If the proof of the exterior condition of the door depended on the testimony of the Rosenbergs alone we might hositate, in view of their signed statement with regard thereto, to affirm the judgment. But the record reveals no interest or metive on the part of the carpenter who repaired the door to give false testimony with regard thereto. There was no attempt to impeach him for want of veracity or personal integrity. He was afforded an opportunity for a more critical examination of the foor than the policemen had under artificial light and all of the circumstances of the time and place that called for more specific attention on their part. The marks, as testified to, were slight

bis of so the day of the transfer of the contemporation of the south man and the contemporation of the contemp reversibly of their making ands a close imprecion as to discover seek marks when they were also invocing the several cuidences of a becklary, including those shown on a bounder's window and on a door leading from the cuteffe of the culling to the lobby, and the remoral conditions of disertor. It is morely probable that the policem need an examination whit reformed to colorated limitiby mades's and true you would be also be the contract of the source of the contract of the state of the contract est to amolianticoval thad? In impact out of as malianter-sects we Tot Mood Tould emid and bus bown, a read amphilipmen and been meniments And the tretingsy of certaining. two amployees aluke imedia nationa Lie mily anterest be regarded as communict blocks, this leavise all of the testimeny on the emigedt for the eredulity of the jury. It is fundamental that the volute of the evicant is not to be determined that tamber of windesce trailiffing one way on one to the temporary aven though the evidence be such as so seve this court in doubt, the glassions for it said you not it on the today but so ton tile still solver Brow . As a state of the service of star mingle of the the transfer of the colours and the figure of the colours and ent to took and the charge shall no serger inviloper soft tooked exterior occition of the door depended on the subliming of the Mosenberge alone to might heafeate. In view of their stenog whateness with regard thereta, to at int the jurgment, -ut the event events and partiagon the country and to be for the partial and action to decrease on door to give fulac testimany with regard wheteur where was no attempt to imposed him for wen' of verocity or " count integrity. with the relativistic to a state of the total of the state of the stat one to the part telefficien white had greentlog and guest wood etribles of the time and pleas that called for any of the attention on their part. The marks, see seedifted to, were clickt

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at best. But if there were any at all, however slight, indicating use of a tool to effect entrance through the door liability would attach under the clause in question.

Much of the testimony introduced was of a character to raise suspicion as to whether it was not a "fake burglary." That phase of the testimony is not argued in appellant's brief. To review it would only lead into the realm of speculation. It afforded, perhaps, grounds for varying views. If that phase of the question was argued to the jury their finding nevertheless was to the effect that there was a burglary and that the premises were entered by the door in question through the use of some tool which left marks on the outside thereof in successfully opening it, and there was adequate testimony to support such a verdict.

During the cross-exemination of Joseph Rosenberg he identified the written document referred to and admitted knowing that it contained the statement that there were no jimmy or other marks on the outside of the door, but which he explained as aforesaid. Defendant then offered the document in evidence, although the time had not arrived for it to put in its case and it might properly have been rejected for that reason. Plaintiff interposed as objection except that it contained the opinion of the police as to how the premises were entered. As, however, the purpose of its introduction was merely to show the admission that there were no jimmy or other marks on the outside of the door, and the witness, Joseph Rosenberg, had admitted that he signed the statement with those words in it, the court thought there was no reason why the document itself should be received in evidence. While we think it was admissible if offered at the proper time, yet in view of the fact that the jury had the full effect of it in said admission, to which the document itself could have added nothing, we do not think it was reversible error to refuse the offer of it in evidence.

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reverse on the weight of the evidence unless the verdict is clearly and manifestly against it we will affirm the judgment.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

Following the long setablished rais to we will not reverse on the weight of the evidence unless the verdick in clearly and manifestly against it we will affirm the judgment.

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PROPLE OF THE STATE OF ILLINOIS ex rel., BEBJAMIN M. JACOBSON, Appellee,

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CITY OF CHICAGO,
Appellant.

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APPRAL PROM SUPERIOR COURT,
COOK COURTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In this case the city appeals from an order for a writ of mandamus commanding it to issue forthwith to the relator an auctionser's license for 426 South State street, Chicago, for the year 1929.

The issues formed by the pleadings and the evidence thereunder present as the main question whether there was an abuse of discretion on the part of the mayor in denying relator's application for a license as auctioneer at said place for the year 1929.

Under the ordinances all licenses for auctioneers expire on the 31st day of December of the year in which they are granted. By such provision relator's license for the year 1928 expired on the 51st of December of that year. It appears that it was also revoked on the same day on the recommendation of the Commissioner of Police.

The application refused was made for the year 1929, on February 2, 1929. These facts are set up in the petition for the writ together with certain provisions of the ordinances relating to the subject.

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In this case the city appeals from an ord r for a writ of mandemus commanding it to londe for imits to the reinter an auctioner's livense for all outs tota sizest, bid us, for the year 1925.

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The notice given by the mayor of the revocation of relator's license for the year 1928, stated that it was done on the recommendation of the commissioner of police and that no license would be issued or transferred to relator or any other person at that place or to relator at any address in the city.

The ordinance provides that such a livense may be revoked upon written notice by the mayor "whenever it shall appear to his satisfaction that the licensec has violated any of the provisions of this chapter or of any other ordinance of the City of Chicago relating to auctions and auctioneers," and that the mayor shall have power to forthwith revoke any such license upon report, by the superintendent of police, that an auctioneer has violated any of the provisions of the ordinance.

The court might well have dismissed the petition for insufficiency it not negativing the existence of grounds for the
revocation. However, defendant made answer denying among other
things that petitioner complied with all the requirements of the
ordinances relating to the business and averring in effect that the
refusal to grant petitioner a license was in a ecordance with the
ordinances under provisions set forth.

Among the provisions of the ordinances cited in the answer is that "all licenses shall be issued to such person or persons as shall comply in all respects with the provisions of this ordinance and as the mayor in his <u>discretion</u> shall deem suitable and proper persons to be licensed," and the provision, that "if at any time after the granting of any license any department head shall certify to the mayor that the licensee is violating any of the ordinances of the City of Chicago or any of the statutes of the State of Illinois in the conduct of his business, the mayor shall have the power to revoke the license therefor."

The motine given by the mayor of the revocation of relator's license for the year 1925, stated that it was done on the recommendation of the countinatemen of police and that no license would be issued or almostered to relater or any other person at that place or to relater at my secrees in the city.

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In his replication petitioner denied that he had violated any ordinances of the City of Chicago or any of the statutes of the state in connection with his business and averred that he had always complied with all the laws and ordinances relating to the business.

On the evidence adduced the court found the issues for the relator and ordered the writ to issue.

In substance petitioner testified that he had complied with the provisions of the ordinances and had never refused or failed to return money promptly in cases required by the ordinance and had never made any false representations as to the merchandise he sold, and testified in effect that he had never violated any of the specific provisions which under the ordinance would justify the denial of a license or its revocation, and explained the methods of his business.

The defense called one Szold, a representative of the Chicago Better Business Bureau, who visited relator's auction place on December 13, 1928, apparently to investigate the way he conducted auctions. His testimony was to the effect that he asked him to put up a manicure set which the relator described as "made of surgical steel, with handles of amber and pearl," which was sold for \$3.50. and that he bid in one like it for the same amount, and also bid in a piece of cloth described as a Persian prayer shawl "imported and made of silk and linen;" that it was auctioned for \$6.00, and "another prayer shawl" was bid in by the witness at the same price. A chemist was called as a witness who stated that he had analyzed the steel in the manicure set and that it indicated a rather low grade of steel, very similar to mails; that it was not surgical steel - that it was not steel at all. Another chemist testified that he separated the warp from the threads of the shawl and made a microscopic and chemical examination of it and was of the opinion that it was made out of cotton and artificial silk, rayon; that

in his replication positionary depi , that has hed violated any ordinances of the antiques of the attacks of the state in connection with his mediaces we avaired with all the lass and archaeces relating to the sunfaces. The lass are archaeces relating to the sunfaces.

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there was no genuine silk or genuine linen in the shaul. Two investigators from the city prosecutor's office also testified. The testimony of one of them substantially corroborated the testimony with regard to relator's representations as to the character of the imported prayer shawl and of the manicure set. His testimony also tended to show that the auctioneer pretended to receive bids on articles that were not made. The testimony of the other investigator was to the effect that one of the persons acting as an auctioneer at said place had previously pleaded guilty to running a fake auction, and represented that he was half owner in the business where the auction was conducted by relator.

The captain of police for the district in which the auction was conducted testified that the investigator from the Business Men's Association had been sent in to relator's suction shop at his request and that upon their complaints he sent a recommendation "through the proper channels" that the license be revoked and the "chief" sent that recommendation to the mayor.

The relator on cross-examination at first said he did not remember what he sold the shawl was made of or that he did not say it was an imported prayer shawl or made of silk and linen. Later he admitted he said it was an imported prayer shawl. Later still he was positive he did not say the prayer shawls were silk and linen; that he did not have any recollection of telling what they were made of at the auction sale, nor of saying the manicure set was of surgical steel, and denied that he ever amounced a price or bid without getting a bid.

The ordinance expressly provides that the license of an auctioneer may be revoked for false representation or statement as to the character or quality of property offered for sale. The main question is whether upon a report to the mayor of such alleged

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main question is moreher upon a report to the cares of main plies and

false representations, as may be implied from the evidence, he abused the discretion lodged in his by the ordinance to refuse another license to relator. It is settled law in this State that to justify the granting of a writ of mandamus the relator must show, by averment and proof, a clear right to the writ, and where discretic is invested in an official his decision cannot be controlled by the writ unless it is shown that he has acted fraudulently or corruptly. Reviewing the evidence in this case we are not satisfied that the evidence offered by plaintiff establishes a clear right to the writ. or that the action of the mayor can be so characterized or constituted an abuse of discretion. The facts testified to in support of the city's answer having, as the evidence tends to show, been brought to the attention of the mayor he might well deem the relator not a suitable and proper person to be licensed and in the exercise of a sound discretion have refused the application. Being empowered to revoke the former license for fraudulent conduct in the misrepresentation of the character of the articles sold at auction, he was justified in refusing to issue another license to the same party. The object of the regulation of auctions and auctioneers by ordinance is to promote the general welfare by protecting the public from fraudulent sales, (City of Chicago v. Ornstein, 323 Ill. 258.) We cannot lightly interfere with the exercise of discretion lodged in the mayor to refuse applications by persons not deemed "suitable and proper persons to be licensed" and thus to protect the public welfare, where the facts are insufficient to show an abuse of his discretion.

The order for the writ will be reversed with a finding of facts.

REVERSED WITH FINLING OF FACTS.

Scanlan and Gridley, J., concur.

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## FIRDING OF FACTS.

We find that relator made false representations as to the character and quality of property he offered for sale as auctioneer and that the mayor did not abuse his discretion in refusing his application for another license.

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CHILE BECKER,
Appellee,
Appellee,
Appellant.

COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for rent for the month of May, 1928, under a lease from plaintiff to defendant. The lease was for an apartment in a three-story building for a period of two years from May 1, 1927. Plaintiff introduced said lease and evidence tending to show that she occupied one of the apartments as her home, and rested. Defendant introduced a certified copy of a judgment of the Municipal Court for \$700 and costs against plaintiff, proof that the premises were sold under an execution issued upon the judgment and levied on said premises, that a bailiff's deed of the entire premises was issued to one Bertha F. Hooper, and that she quitclaimed her title to her husband, James H. Hooper; that thereafter on being shown said deeds defendant paid said James H. Hooper the rent for the month of May, 1928, herein sued for, on his demand therefor after producing the said two deeds.

Defendant also introduced in evidence the record of a bill of complaint filed by plaintiff against James H. Hooper prior to the issuance of the bailiff's deed, to restrain its issuance and have the certificate of sale declared null and void, among other reasons because as alleged therein plaintiff's homestead was not set-off, and the property was bid in for less than \$1,000. Defendant also intro-

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This is an apprendict to a later for rest for rest for the lease of May, 1922, under a lease from claiming to a delected. The lease seek from an apprendict in a three-story outsing or a period of the dease training to show that one coupled one of the apprendict of the lease training to show that one coupled one of the apprendict of the lease there is a continued a continued a continued an apprendict of the best hand of the business three sold under an execution that of a product the premises here sold under an execution issued apprendictive premises here the premises here sold under an execution issued of the entire premises and to the a continue, the a continue, and the the three the training of the anti-course in Kooper, and that the entire the rest of any, itself, hereix and factor is the thought of and after an arter producing the anti-course and for, on his demind the rest for anti-course the said two occurs.

of complaint filed by plaintiff against Jewes its respect of a city of complaint filed by plaintiff against Jewes its insurance of the complaint the course of the course

duced the decree dismissing said bill for want of equity.

Appellee has filed no brief. It is eaid in appellant's brief that the court apparently decided the case upon the theory that the bailiff's deed was void by reason of plaintiff having a homestesd estate in the property. We fail to see that any such question is presented in the record. For aught that appears to the contrary, plaintiff's homestead rights may have been set-off & antisfied.

If the court's decision was based upon the general rule that a tenant is estopped to deny the title of his landlord as it existed in him at the time of the creation of the tenancy, the court erred. While a tenant cannot demy his landlord's title he may, however, show that the title of his landlord has been divested by operation of law. (Spafford v. Hedges, 231 Ill. 140, 145, and cases there cited.) And one of the methods by which he may show it has been divested by operation of law is by an execution sale. (Corrigan et al. v. City of Chicago et al., 144 Ill. 537.547; Franklin v. Palmer et al., 50 id. 202, 206; Supervisors v. Herrington, 50 id. 232; Tilghman v. Little, 13 id. 240, 35 C. J. 1244.) In the Tilghman case, supra, the court said that where the estate is vested in a third person by operation of law the tenant holds possession subject to the title of such person, that the relation of landlord and tenant becomes disselved, and the latter no longer holds the premises under the former. (p. 242)

That under these authorities defendant had the right to attorn to the holder of title under the bailiff's deed as the true owner cannot be questioned. It follows, therefore, that plaintiff had no right of action against him after he had so attorned. Accordingly the judgment must be reversed as a matter of law.

REVERSED.

duced the deeres disminsing said bill for sant of equity.

Appeller has filed no brief. It is east in appellant's brief that the court apperailly decided the case upon the theory that the buildfi's deed one void by reacon of plaintiff eaving a homesteed estate in the property. We fail to see the lany much question is presented in the record. For aught that appears to the contrary, plaintiff's homestead rights may have been est-off or enteried.

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METROPOLITAN PETROLEUM COMPANY, a corporation, and MAT RUE, Appellants. APPEAL PROM MUNICIPAL

COURT OF CHICAGO.

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MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order overruling a motion of appellants to vacate the judgment entered by confession upon the warrant of attorney contained in a judgment note for \$562.50.

Petroleum Company, a corporation, had become involved in certain complaints made before the Illinois Securities Commission, and that said commission had advised the corporation that unless it made settlement with J. L. Herman, the payce of the note, the commission would not dismiss the proceedings, and that thereupon Izrael D. Zimmerman, president of the corporation, and Mat Rue, its secretary, took back certain certificates of stock involved in said complaints aggregating the sum of \$1500, and executed the note in question and two others for \$500 each, to the order of said Herman, in the name of the corporation, and adding thereto their own signatures.

The note in question was endorsed by said Herman to plaintiff Baeri

The petition of appellants charges that Baer had knowledge of the facts that transpired at the time of the execution of the notes; that Herman received no consideration for the assignment to Baer; that the notes were signed under coercion, pressure and duress of said commission by which said Simmermen and Rue agreed on behalf

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This is an appeal from an order overruling a metion of appealments to vacate the judgment subtreed by confession upon the varrant of attorney contained in a judgment note for \$562.50.

From the vertiled pelitions it appears that the Netropolitem Patroleds Company, a company, took become involved in activin compinity made before the illinois Courisies Commission, and that eaid commission had advised the corporation that unless it and not believed with I. I. Armen, the payer, of the note, the commission wealt not dismine the gradedings, and the the temporation larged b. Signerumn. President of the composition, and the composition and the secretary took book services are citificated of each involved in and camplaints agreen that the num of their ord except the nate in another and and are other the number of the number of the number of the section of the sections and the therete their and signstures.

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The petition of appellants charges that had knowledge of the fact that that the transpired to the time of the exemption of the notion; the thorax received no consideration for the assignment to fact; that the notes were signed under coordion, resource and curess of

said commission by which and bincornen and due agreed on bonal

of the corporation to take back Herman's certificates of stock and execute the three said promissory notes; that they refused to sign the notes as co-makers; that they signed them in their official capacity and not as individuals; that the obligation assumed the notes were to be a corporation obligation; that there was no other consideration therefor moving either to the corporation or to its president or to its secretary either individually or in their official capacity, and that they had no authority to enter into an agreement to give the power of attorney to confess judgment against the corporation: that its board of directors never gave them authority to execute judgment notes; that their agreement to buy back the stock with said notes was without authority; that the corporation was bordering on insolvency and that restitution to plaintiff will endanger its solvency, to the detriment of its creditors, and that about four months after the execution of the notes the board of directors of the corporation repudiated the transaction entered into with said Herman, as sforesaid.

by this same plaintiff against these same defendants came up on appeal to this court in case No. 33349, which was a suit upon one of the other notes. In that case the same proceedings were had in the court below as in the case at bar - a judgment by confession, a motion to vacate the same, and an order overruling the motion, from which an appeal was prayed. The petition to vacate in that case was based upon the same grounds and allegations as contained in the petition in the instant case, and the same points were made on the appeal. It was there held that the note on its face shows that Mat Rue signed in his individual capacity only and not as an officer of the corporation; that his undertaking was absolute, and that oral testimony would not be admissible to show that he did not intend to incur a personal liability, citing Mypes v. Griffin, 89 Ill. 134;

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that the facts set out in the petition showed a consideration; that from them and the circumstances said officers of the corporation signing the note had power to execute the judgment notes; that the rights of the creditors were not involved in the case; that so far as the cognovit exceeded the power granted in the warrant of attorney in agreeing that no writ of error or appeal should be prosecuted on the judgment, the point made with regard thereto had no special merit, as plaintiff was not questioning the right of defendants' appeal. Whether it appeared in that case or not it does appear here that at the time of the execution of the notes Zimmerman and Rue were not only president and secretary, respectively, of the corporation but were two of the three directors of the corporation. It can hardly be said, therefore, that the transaction having been entered into by a majority of the directors it was without authority.

It also appears that said Herman brought suit against these same defendants on the third note in which like proceedings were had as in the other case and in the case at bar. On the appeal therein, case No. 35235, the court affirmed the judgment on like grounds as stated in the opinion in the other case.

Referring to the opinions in those two cases we see no reason for repeating what was therein said upon a like state of facts as presented in the case at bar. For the reasons therein stated the judgment in the case at bar will be affirmed.

AFFIRMED.

Seanlan and Gridley, JJ., concur.

that the facts set out is the potition elemen a consider that first from them and the stroumstanders and officers of the despotition ofgning the mote had yours to execute the jungment notest that the rights of the erections eare not involved in the constitution of atterney as the comments exceeded the power greated in the constitution of atterney in agreeing the two exits of error or appeal should be proceeded on the judgment, the point was with regard that the constitution was not questioning the right of defendants' appeal. The lime of the exception of the notes at the care not not the test of the corporation but were not president and secretary, respectively, of the corporation but were two of the three circulars of the corporation but were two therefore, then the transaction having near entered this except its the transaction having near entered this amportant is were victor alternations. It can bordly be eately the character, the transaction having near entered this or the transaction having near entered this or a majority.

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Joanian and Gridley, II., comput.

ROBERT A. UINLEIN.
Appellee.

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GOURT OF CHICAGO.

E. H. ASCHERMAN, N. D.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant.

Defendant herein, against whom a judgment for \$132 had been entered in the Municipal court of Chicago, appeals from an order, entered on plaintiff's motion and petition, striking from the files a satisfaction piece signed in plaintiff's name by M. L. Carmody, as his attorney, acknowledging satisfaction of the judgment.

It appears from affidavits filed in behalf of both parties that said Carmody compromised the judgment on receipt of defendant's check for \$100, which has been returned and never cashed.

The motion was supported by affidavits of both plaintiff and said Carmody, stating that Carmody, without consulting plaintiff and without any authority whatsoever, accepted said check for the full amount of the judgment and executed such satisfaction piece. A rule was made on defendant to answer. He filed an affidavit in which he denied that said attorney Carmody was without any such authority and alleged that he had full authority to accept said check in settlement, without setting forth any facts to support such claim.

The affidavits on both sides set forth representations made at the time of delivering the check which are wholly immaterial

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I. F. ABCHÉRLE, M. .. ASPALLANT.

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if said attorney was without authority to compromise the judgment.

It was said in McClintock v. Relberg, 168 Ill. 584, that an attorney has no implied authority to compremise his client's claim; that he cannot bind his client by any act which assumts to a surrender in whole or in part, of any substantial right; that he cannot commute a debt or materially change the security which his client may have, without his consent. The court also said that where an attorney in making an agreement with the opposite party compromises a claim for less than the amount due or accepts anything other than money in payment of the claim, such party is put upon inquiry as to the attorney's authority to make such compromise or settlement, and, if he omits to make inquiry, or to demand the production of authority, he deals with the attorney at his peril. Recognizing the general rule on the subject in Miller v. Lame, 13 Ill. App. 649, it was said that to authorize the attorney to settle and discharge the debt or compromise the judgment for a less sum than the entire amount due he must be specially authorized by his client or the latter will not be bound by his acts unless subsequently ratified .

It appears that the case was submitted and heard without objection and without any other sworn testimony than "the petition and enswer and affidavits and documents."

It is urged that it was error to enter the order without hearing other evidence, it being a question of fact whether Carmody had authority to make the compromise.

The record discloses no objection to such proceeding and no motion of any kind by defendant before or after the entry of the order on which to base any of his assignments of error. As no implied authority of the attorney to compromise the judgment can be inferred

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from the state of facts set forth in the affidavita of either of the parties, and as plaintiff and his attorney will be presumed to know whether there was any specific authority given, and defendent set forth no state of facts in his affidavit showing such specific authority or grounds for inferring it and under the circumstances would be put upon inquiry to show Carmody's authority to compromise the judgment, his affidavit was insufficient to throw the burden of proof on plaintiff. He saw fit to submit the case entirely upon the affidavits. From them the court could reach no other conclusion.

AFFIRED.

Scanlan and Gridley, JJ., concur.

from the state of facts is forth in the Station of cities of either of the frequency the precises to the precises, and as plaintiff and his electric, it on, and ifending there are any specific councils, it on, and ifending ast for, a no arets of facts in his fill the vit chartur, and epecific cultarity of pround. In this order it and use I the chromates would be put apon inquiry to that the mody's subtactive to compactive to the put apon inquiry to that the originalist the judgment, his of the state of the order the order of proof on phointiff. For a fill to occase the contact the order continue the state of the contact of the contact on phointiff. For a fill to occase the contact on phointiff. For a fill to occase the contact on phointiff. For a fill to occase the occase of the contact on phointiff.

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MASK JACOBS, Appellee,

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SADIE RUSSELL, Appellant.

255 I.A. 616

ME. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit by attachment against defendant, a non-resident, to recover a balance of \$90 alleged to be due under the terms of a written contract. The contract provided that plaintiff should furnish all labor and material "necessary" to complete "all necessary work to be done in the opening of the ground from the building at 3543 South Michigan avenue, to the main sever in Michigan avenue, and connecting said building with said main sever in Michigan avenue," and to furnish all necessary permits, the work to be inspected and approved by the departments of local government having jurisdiction or control over the same, all for the sum of \$320, of which plaintiff was paid \$230.

with the contract. After digging inside the lot line and rodding therefrom to the main sewer the obstruction that caused the trouble was removed and it was not necessary to open the street between the lot line and the main sewer and, therefore, not necessary to procure a permit therefor. Because of that fact appellant contends the contract was not fully performed. The mere reading of the contract should answer the point. It expressly provides only for necessary work in connecting with the main sewer, and the fact that the opening of the street for that purpose was not necessary is not

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MR. PR. TRIES AND TICE RANNIE. DELIVERED THE CALFICE OF THE CORET.

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questioned.

While in fixing a sum for the work to be performed the parties evidently contemplated that such an opening of the street might become necessary the fact that it was not necessary did not change the obligation of defendant to pay the sum as contracted for. The sum was not made conditional in case such an opening did not become necessary.

As to the points that plaintiff was not a licensed drain layer or plumber and that the work was not approved by the proper governmental authorities the records of the city department of the board of examining plumbers were introduced in evidence and show that plaintiff was duly licensed. The proof was admissible and the fact was not controverted. And while it appears that the work was inspected by an inspector for the department of sewers, it was shown that it was the custom of the department not to make any formal approval "of such small jobs."

AFFIRMED.

Scanlan and Gridley, JJ., concur.

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This in fixing x and for the seek to be performed the parties evidently contempiated that such as opening of the atroct might become necessary the fact that it was not necessary did not change the obligation of defendent to pay the sum an contracted for. The sum was not made conditional in case such an opening did not became recessary.

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forcal approval "of such such labe."

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JACOB OI WITZ, Plaintiff in Error,

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WESTERN MACHINE WORKS, a corporation, Defendant in Error.



MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a replevin suit for the recovery of possession of certain goods described in the affidevit and writ, consisting of numerous parts and pieces which defendant bought to be used in the assembling of vibrating machines.

The machines were to be manufactured by defendant for plaintiff under a verbal contract whereby plaintiff was to pay defendant therefor the shop rate for time and whatever the material cost. We question areae as to the shop time rate or the cost of material. On the basis of charges therefor it was agreed that the balance that might be owing to defendant at the time of the replevin was \$3,703.15.

Plaintiff took a nonsuit and the court then assessed the damages at said amount and entered an alternative judgment that plaintiff pay defendant that sum within ten days or that a writ of retorno habendo issue. Plaintiff tendered the goods taken and defendant refused to accept them. Evidence was then heard as to the tender, and on defendant's entering a remittitur down to \$1,000, the amount of damages named in the affidavit and the jurisdictional limit of the court, the court then entered judgment numc pro tune, in the alternative form as aforesaid, for \$1,000 as

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INCOR OR SERVER.

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ETTEN MACRIE MORES.

ROTTORRISON:
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of certain grads described in the efficient party of percents of certain grads described in the efficient but poit, consisting of numerous parts and pieces which defendant beauth to be used in the assembling of vibrating machines.

The modification ward to be exemple found by defendent for plaintiff under a verbal contract whereby plaintiff rest to pay defendent therefor the auterial destination are as as the char char cate or the seast of material. We question areas as as the char char it as agreed that the had that the best of charges therefor it as agreed that the balance that the trace of the repleving alleged to the trace of the repleving as the representation as the representat

Pinimeter at said amount and entered an alternative judgment that planter at said and entered an alternative or that pay defendant that the entering tender of the said pay defendant that the tender of the said and said and defendant refuer to accept them. 'vicence a stan heard ac to accept them. 'vicence a team heard ac to the tender, and on defendant's entering a resittion count to \$1.000. The encumb of tenders's entering a resittion of the judgment the distinct of the court the encumb of the court then entered judgment and the fine of the court then entered judgment and

damages.

On the theory that defendant had a common law lies on the property for services rendered and materials furnished to plaintiff, appelles seeks to justify an alternative judgment under section 22 of the Replevin Act which provides: "If the property was held for the payment of any money, the judgment may be in the alternative that the plaintiff pay the amount for which the same was rightfully held with proper damages, within a given time, or make return of the property."

Construing said section in Lamping Bros. v. Payne, 83 Ill. 463, 466, the court said:

"The provision applies only to cases where the general property is in the plaintiff, and the defendant shows a special property, consisting of a right to hold the property, as against the plaintiff, only for a certain sum of money, as, where the defendant showed special property by a levy of a fi. fa. against the plaintiff, or where defendant holds the property as the property of the plaintiff, but by virtue of some lien, as carrier, warehouseman or otherwise."

As we construe the contract it was for the furnishing of completed machines on the basis of the cost of material and the usual shop rate for labor expended in making them. If so, that gave plaintiff no general property in the separable pieces purchased by defendant for use in the construction of the machines.

The property, therefore, was not held by virtue of some lien. And even if it was held for money eved by the plaintiff, yet as said in Janes v. Gilbert, 168 Ill. 627, "the statute does not say that the money must be money owed by the plaintiff, but only that it must be money for the payment of which the property was rightfully held."

These pieces were very numerous, consisting mainly of various parts purchased to be put together in assembling the machines, such as piping, plates, washers, plugs, clips, wiring,

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discs, screws, rollers, pulleys, motors and many other miscellaneous parts used in a asembling them into a vibrator. On the tender of them defendant found that many of the discs and pulleys had been changed in some respects and were not in the condition as when taken under the writ, and thereupon without examination of any of the other pieces and parts, refused to receive any of the articles so tendered.

While defendent was not obliged to accept property that was not in the condition as when taken on the writ it was bound to accept a proper tender of property that remained in such condition, if separable, as appears to be the case here, from the other parts so that they were in no way dependent on the others for use or value. The evidence indicates that they were staple articles that had been purchased at various stores. If they were not injured or damaged a return of such parts constituted a defense pro tanto.

(Edwin v. Cox. 61 Ill. App. 567, 570; Harts v. Mendell, 26 id. 274.)

Plaintiff effered to prove the fair and revsonable value of all the goods taken on the writ and of the rejected goods and to show that the value of all the goods taken did not exceed \$500, and changed, the value of those including the cost of reproduction and a ctual work done on them by defendant, would not exceed \$100. On objection by defendant the offers were rejected. The court erred in not receiving proof of damages actually sustained, and it could not take us the measure or proof thereof the sum of \$1,000, as fixed in the replevin affidavit. (Farson v. Gilbert, 85 Ill. App. 364; Peters v. Brown, 245 id. 570.)

Accordingly the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMARDED.

Scanlan and Gridley, JJ., concur.

discs, screws, rathers, pulleys, motors and many other viscollarsous parts uses in a combitm, this into a vibrator. On the tental of them them defended in found that under out the discs and pulleys had less undergot in some rangeouts and were not in the combitment of and chercupou at hour exemination of any of the citer pieses and parts, refuse to receips any of the arbitions of

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MARIAN B. JACKSON.

Appellant,

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JAMES P. JACKSON, Appellee. 255 I.A. 616

COURT, COOK COUNTY.

MR. PRESIDING JUSTICS BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree dismissing for went of equity a bill for separate maintenance.

The parties were married in 1902, and lived, so far as the evidence shows, with apparent mutual trust and affection until shortly before the husband left the wife in July, 1927.

The bill was filed in March, 1928, and the decree was entered in May, 1929. In the meantime, correspondence and conferences looking to their reconciliation proved ineffectual and the case went to a hearing on the date of the decree.

We have to look mainly to the testimony of the parties themselves and the correspondence had between them for light upon the issues of the case.

From her testimony it appears that in February, 1927, on landing at San Francisco from a trip to Honolulu in that month she received a message from her husband that he was going to Boston about March 4th. She reached Chicago March 12th. Suspicions aroused that he did not go to Boston led to questions about it and he finally said he had met some "other woman" and wanted his wife "to let him go," but that he had done no wrong. Several conversations were had later on the subject in which she offered to help him

Ménicas a. Journes. Appellant.

James P. Jechson, Spellen.

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"We have to look mainly to the testiment of the prince of the parties of the conference and the correspondence had been for light open the insuce of the cone.

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"fight this business" and teld him he could not trust the "other woman" nor "expect happiness built on broken hearts and broken homes." Thereafter he was not home much Saturdays, Sundays or evenings before he left her. To get him "away from his trouble" she tried to persuade him to take a trip with her, but he left her, as before stated, in the following July. She remained thereafter in their home apparently supported by him until the same was sold when she leased an apartment.

In October, 1928, he told her if she would make it possible for a divorce he would marry the person referred to as the "other woman." Then a motion for alimony came up on February 1, 1929, he stated in open court that he wanted to take her back. Thereupon she wrote him a letter on February 4th saying that until he made that statement in open court she thought a decree was inevitable and offered him the opportunity to come back and make a new start; that she "wanted to do this," but that when he sold the home she decided it would do no good. and now his statement had changed her mind; that he could come to her apartment, the lease for which had several months to run; that she could have no piece of mind the rest of her life if she did not do all she could to give him a chance to come back, and would gladly meet him at any time and place he said, and asked him to take time and think if he wanted to come back - "to be honest with himself and with her." He answered the letter March 5. and said his offer in open court was sincere and renewed it but suggested the furniture should be removed to his home and that her apartment be sublet. On receiving his letter Friday, March 15th, she called him on the telephone and asked if he wanted to come back. He answered that he had not time to talk but would call her the next day. He called her Wonday evening and said: "That do you want to see me for?" She answered that she "wanted him," and he said, "Well, I will call you up again some time." In response to such indefiniterenor " this desire the plant of the man and of the "case and the " common woman' " the part of happing the product the properties of the part of the

in vitable, 1013, or void her if she would make it services at tothe a clearant has really aim persons referred to an abstacl a context women. . have a making for limeny or an ap on 'sbare y le 1930s be etaled in deep sourt the exact to take ter back. Thereadon Sand come of film a fit the caying file caying the the case that a come the affectivent car serve to depute and from angular residents the second at the contract of ode septi one bles a, cor i ar and " the ob or name" and work The popular how drawn, it will now bun another of the at trained ated a cast to real of the real residence of the terms of the mer and the to the the court cast there are the the rate and the class the real or women's a city. The or late and the are the the all the the dome bases, and this placed now the tract of the or the and a sky o are a constant and the control of the c THE LESS SEE SEE TO LO LOWER OF "LAST WILL LIKE I LIKE THE BOOK OF 3+ all bolds thin effect to aven and been slauter and renewal 1 to bus the date of the furnishment though the company of the contract the the contract the contract that t and the self the self of the control of the self beautiful and the self beautiful and A MON MICH IN MICH. I A LOND AND I AND A DESCRIPTION OF A MONTH WAS A MONTH OF A MONTH OF A MONTH WAS A MONTH OF A MONTH us and and out the last the main as grace a color of a color after after one at tament to be a fine and the second of the second of 

ness and indifference she said he could not play fast and loose with her like that.

It does not appear that they had any further conversations until the Tuesday preceding the hearing, May 7, 1929. It was had in the corridor of the court room in the presence of a lady who accompanied her on the trip to Monolulu. They all arranged to meet the next day at the Medinah Athletic Club. Then they met he said that he had nothing to say - that they had invited him. Mrs. Jackson them said she had written him in good faith and wanted him to come back. She testified to the above state of facts and they were in no respect controverted.

when defendant took the witness stand his only attempt at justification was the statement that his wife had spent about a third of the time away from him in her travels, though he gave no details to substantiate that statement. On the contrary her testimony was to the effect that the trips she had taken, one to Honolulu, another to California, and a Mediterraen trip were taken within the previous eight years; that they altogether covered only a few months and all were with his assent and paid for by him. The lady who accompanied her to Honolulu testified that he expressed gladness at the trip and that it was with his consent. The only other trips testified to were yearly trips to visit her mother in Syracuse, H. Y., for about twe weeks at a time, on some of which he accompanied her.

To attempt was made by him to refute her evidence in any other respect. There can be no doubt that her testimony established a clear case of separation without her fault and without even the color of a legal excuse on his part for deserting their home.

Neither the decree nor the court's remarks before entering it can be reconciled with the evidence.

near and indifference who said he could not play fast and laces with her like that.

It does not appear that they had any further conversations until the Tuesday proceeding the hearing, Nay 7, 1869. It was had in the corridor of the court room in the processe of a lady who accompanied her on the trip to denolule. They all arranges to nect the next day at the Scotena Ataletic Club. Hen they not he cald that he had nothing to any - test they had invited him. Mrs. Jackson them and the and written him in good faith and wented him to come tech. The testifies to the above eight of facts and they were in no respect compression.

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The law on the subject is not at all doubtful. The right to relief under it where, as here, the evidence is sufficient to support it, does not rest upon either the discretion or caprice of the chancellor. It is as absolute as any other legal right.

As upon the evidence complainant is entitled to a decree for separate maintenance it is unnecessary to discuss the error of the court in denying complainant the right to rebut the evidence of defendant even though it was of slight importance and relevancy.

The record discloses that complainant's solicitor moved to dismiss the bill at the close of the evidence while the cort was expressing its views of the case. Complainant unquestionably had that right. (Thitaker v. Irons, 300 Ill. 254; Pischeimer v. Kuperomith, 258 Ill. 392.) But appellant does not insist upon it here.

Appelles urgen that if a wife without sufficient justification fails or refuses to return to her husband and live with him at his reasonable request, she is not living separate from him without her fault. Not only are the authorities cited on this point cases where the wife had in the first instance left the husband but it is clear from the evidence in this case that the husband rejected the overtures of the wife for reconciliation.

The decree will be reversed and the cause remanded with directions to enter a decree as prayed for in the bill and with directions to reopen the case for further evidence, if necessary, to determine what may be a reasonable support and maintenance for complainant while the parties continue to live apart. If, however, before the entry of such decree complainant should still desire to dismina her bill she should be permitted to do so.

REVERSE AND REMANDED WITH DIRECTIONS.

Scanlan and Gridley, JJ., concur.

The less on the subject is mot we all deubtful. The right to relief under it where, as here, the crite-noe is sufficient to map ure it, does not west upon alther the discretion or exprise of the chancellor. It is as absolute as any other legal right.

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255 T.A. 616

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The judgment for \$1585 appealed from is predicated upon a breach of contract of bailment to safely keep, store and return plaintiff's automobile on request. The statement of claim charges such a contract, alleges such request and a breach of the contract in failing to return the automobile on demand.

Plaintiff kept his automobile stored in defendant's garage for an agreed compensation. On the night of July 27, 1928, about 11 o'clock, plaintiff took his automobile as usual to the garage and picked up the attendant to take him home, who on his return stored the automobile unlocked a few feet away from the entrance door, which was left open. After placing defendant's ear away the attendant came to the front door and saw two automobiles drive up and park across the street, and noticed that the occupants were engaged in conversation there until about 3 o'clock in the morning. In the meantime the attendant was about his usual work putting away cars in their stalls as they came in. Shortly after 3 o'clock while he was putting away a car in a remote part of the garage that was separated by a wall from the part where plaintiff's

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H. M. HARDY, Appellee.

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MARY POTTER SMITH, Appellant.

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H. M. HARDY.

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APPRAL TRUM MUNICIPAL COURT OF SHICKOL.

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MR. PPENIDING JUSTICE BANKES INLIVERND TEE OPINION OF THE COUNT.

The judgment for \$1565 appealed from is preciented upon a breach of semirate of ballment to exfely keep, store and return plaintiff's sutembile on request. The statement of claim charges such a santract, alloges and request and a breach of the contract in felling to return the sutembile on demand.

Finished the an agreed componention. On the highest in defendent's garage for an agreed componention. On the highest of July 27, 1929, about 11 o'clock, plaintiff took his automobile an unual to the standard to take his home, who an his return stored the automobile unlooked a few feet any from the entrance foor, which was left open. Ther placing colocant's car away the attendant came to the front coor and as two automobiles drive up and park acress the street, and noticed that the accupants were engaged in conversation there until about 3 o'clock in the norming. In the meantime the attendant was about his usual early putting away cars in the meantime the attendant was about his usual early putting away cars in the meanting away a far in a remote part of the cartes that was atout as a remote part of the cartes that was atout as and from the secret where plaintiff's

went into the part where plaintiff's car was stored and saw it being driven out of the garage. He whistled for the car to stop but it went on. He then noticed that the men across the street had gone. There was no other attendant in the garage at the time. He went to plaintiff's house and learned that plaintiff had sent no one for the car. After the car was thus stolen plaintiff demanded its return and it has not been returned or apparently found. The finding of the court was predicated upon defendant's negligence as such bailee in leaving plaintiffes car unlocked near an open door under such a state of circumstances.

Whether defendant exercised that degree of care required of a bailed under such circumstances was a question of fact to be found from the evidence and we cannot say on reviewing the same that the finding was against its weight. We find nothing in the evidence not above recited that would in any way modify the conclusion of negligence on the part of the bailed under such circumstances.

The car was practically a New Chrysler car. It was only three months old and uninjured. Its price, new, delivered in Chicago was \$1985. The witnesses disagreed as to its market value at the time it was stolen. There was sufficient evidence, however, from which the court could reasonably find the market value to be \$1585, the amount of the judgment.

It is also contended the court erred in admitting improper evidence and in refusing proper evidence. The instances complained of, even if erreneous, are not such as should call for a reversal of the judgment.

The property was insured for \$1382. The insurance, however, was not for the benefit of defendant. (Byales v. Matheson, 328 Ill. 269.) The damages are not to be measured by the amount of the insurance but by the value of the automobile at the time sent into the part where plaintiff's one of a stored and one it being criven out of the gerigs. It whistles for the car to acoptuit it went on. As them notions that it was about one the time of the other that it went gens. There we an other strenders in the gerigs at the other that it is sent to acopt at the interest of the interest of the cast of the cast of the cast of the sent of the contact of the apparently found. The their bather is leaving at the court was predicated upon defendent an apparently found. The their bather is leaving a sinter of the court was predicated upon defendent as over an out of the cast of the correspondent.

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it was stolen. (Osgood v. C. & N. W. Ry., 253 Ill. App. 465.)

While the pleading may not answer the technical requirement of a common law pleading it is sufficient under the practice of the Municipal Court. It apprised defendant of the nature of the claim, and as he took issue and adduced evidence upon the theory of a breach of such contract he is in no position to question the sufficiency of the statement of claim in this court.

Accordingly the judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

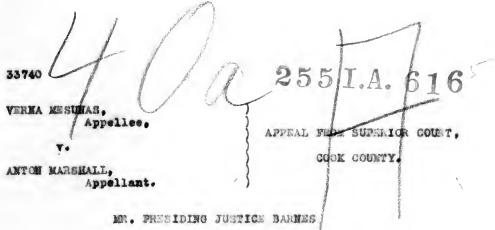
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DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$500 in a personal injury suit tried with a jury.

The evidence discloses that on March 6, 1927, several persons, including plaintiff and defendant, were gathered together socially at the home of appellee's brother. Between 7 and 8 p. m. they left the house intending to go to their respective homes. Then plaintiff's brother spoke about taking them home in his Ford car one of them suggested that it was not large enough and thereupon, as the evidence tends to show, defendant, having a large car, enclosed model, invited them to go with him. Thereupon he and his wife and plaintiff took the front seat, he driving, and Mr. and Mrs. Orban and Ers. Kobilis citting in the rear seat. When on Washington boulevard, going east, they reached 19th street, the automobile collided with a street car, causing the injuries of which plaintiff complains. The car had entered Washington boulevard and turned east thereon about two or three blocks west from the point of the accident. While driving on Washington boulevard plaintiff testified that the speedometer indicated 42 miles an hour and at times indicated a speed near 50 miles an hour; that defendant's wife, as they approached Washington boulevard, said, "don't go so fast, we are coming near Washington boulevard;" that he "stepped on the gas," told her to shut

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her mouth; that plaintiff then shouted, "the street car," and "hollared" just before the accident. One of the other occupants of the car in the back seat testified that the car was going very fast and she heard some one in the front seat say, "don't go so fast." and right after that the accident happened. A witness who got off the street car at the intersection of 19th street and Washington boulevard testified that in his opinion the car was going between 40 and 60 miles an hour; that it struck the street car somewhere to the rear of its center and derailed it. Defendant himself testified that he was going about 25 miles an hour at the time but that he never saw the street car until he ran into it. There was nothing to indicate why he should not have seen the street car had he been in the exercise of ordinary care and the jury were warranted in finding from his own testimeny negligence in attempting to cross the street at such a time and place under such a rate of speed without looking to see whether there was a street car at the intersection or about to cross it.

The point made that the verdict was against the weight of the evidence is not well taken, and that there would be a liability under such circumstances cannot be doubted.

Complaint is made as to the amount of the judgment.

While plaintiff was not severely injured she was cut about the head, chest and lege. Her jaw was bruised and her teeth loosened, necessitating numerous visits to a doctor and a dentist. While the evidence shows liability to them on her part, the amount due or payable to them was not testified to except as to one paid bill for \$15. At the time of the accident she was earning \$25 a week. She was kept out of her employment for about three weeks and when she went back it was at a reduced wage for a considerable period of time not definitely stated. We cannot say, however, that the judgment is excessive in view of the nature of her injuries and that state

end are the said this then ender a street car the said "hollwred" just before the socioest. The order occupants of the car in the back coet teatified that the our - a ding resp fast and ake many each out in the frank and the far tert ode as adi: . berrygan des loor ond d ad toda Mair bon ". deel had there doll to arithearrant and to real threath and the top maker a - 2 to 2/2 ...liken tur at 1200 believed "tryoker meganider" setween to and at wiles an hear; that it streed the truth or reme-Misser to cooks will sellered our vitue out to meet and at erect. turbilies to a la contra density of the grant of the salt of the s and the court of the act of Liene to the first of the court of the bus you from the transmission was the storm of the stolers of granton enduring or or or the life is the configuration of is finding from his one sentimony manualles in accempant to erong well- youge to for a cour toward as it has soil . House a first's soil winding and in the firsting of this in the second confidence and a confidence with emerge of duote to moliose

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of facts.

It appeared from the testimony that one of the passengers died three days after the accident. The testimony was stricken on defendant's motion. It is urged that it was sufficiently prejudicial to require a reversal of the judgment. The judgment is too small to make the point presuasive.

It is urged in the brief that there should have been a new trial granted on affidavits as to newly discovered evidence. The point is made, however, without having abstracted the affidavits or referred to their contents. In such a case we will not search the record for their contents to reverse the judgment.

The judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., conour.

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WILLIAM B. FOR,
Appellee,

APPEAL PRON SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree granting complainant a divorce on the ground of desertion, and dismissing for want of equity defendant's cross bill praying for separate maintenance.

The parties were married September 13, 1926. The original bill, filed November 5, 1926, asked an annulment of the marriage on the ground that it was never consummated by the parties having sexual intercourse; that up to October 13, 1926, defendent refused to have the relation and thereupon complainant left the apartment they were occupying. The parties, however, resumed living together in the same apartment on November 15th and continued to live there and occupied the same bed for four months thereafter, until Narch 17, 1927, when he again left her and went to live with his mother and sister.

It is inferable from the record that the lease to the apartment they had occupied expired on October 1, 1927, that she occupied the apartment up to that time, and that he continued to pay the rent therefor and paid her a weekly allowance. The parties never lived together after he left her as aforesaid in the previous March.

No action seems to have been taken after the filing of the bill until August 26, 1927, when on leave given she answered

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the bill of complaint denying the charges therein. No further action seems to have been taken until March 28, 1929, when she filed her cross-bill for separate maintenance. Two months later, on May 27, 1929, complainant filed an amended bill setting forth the same charge as in the original bill and the additional charge of desertion for over two years. Defendant's answer to the amended bill denied the charges made therein and repeats the charge made in her cross bill of his abandonment of her without justification.

Outside of complainant's own testimony there was no evidence tending to confirm his statement that there was no sexual intercourse between the parties during their marriage except the evidence of his mother and his sister to alleged admissions of the want of such relations made within a week after their separation in March, 1927. They testified that defendent about that time came to the home of the mother where William had gone to live and wanted him to return and give her "another chance." The mother testified that she told defendant "it was no use in asking him any more." without explanation that the mother never visited their amertment. Thile defendant denied ever having made any such admissions and testified affirmatively to sexual relations with her husband frequently during the four months after November 15th, they lived together and occupied the same bed, yet if the testimony of the mother and sister be true that she expressed a willingness right after the final separation to perform her marital relations there would seem to be no justification in complainant's failure to return to her.

It appears, however, from several undated letters from defendant to complainant, apparently written between the time of the separation and October, 1927, that the feelings between them had become much strained. In them she chides him for claiming such a ground for their separation, berates him for unmamliness and refers to a "disease" he had. In the third letter she states that she is

the bill of complaint despin, the charge therein. We farther solion seems to have been taken until thresh the trops to have been taken until thresh the trops bill for separate interingues. Two cashes later. on May 27, 1925, complainent filled an assender will setting forth the same charge as in the original bill and the meditional on age of describen for over the years. Therefore, and set to the assended

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through coaxing him, that he is no longer worthy of her love and that he had treated her worse than a "drunkard." In a later letter she refers to his refusal to pay rent after October 1, and states that he has ruined her life after "playing around" with her for seven years; that she had been good and loyal to him; that he had wasted her life and that she would never take him back. In her later letters she expressed a desire for a divorce and that they reach some understanding with regard to it.

Notoral evidence was given in explanation as to any of the facts hinted at in these letters except that the husband denied that he was diseased.

We cannot but be impressed from the entire record that there was a reluctance on the part of both parties to testify to the real facts that caused their separation.

To establish desertion complainant relies entirely upon the claim made in the original bill. No proof or charge of disloyalty or prior lack of virtue was preferred against defendant. There was medical testimony tending to confirm her testimony as to the existence of such relationship during the four months from Bovember 15th after they were married. They were young people, both under 30 years of age. In the absence of proof of any facts or circumstances having a matural tendency to confirm the husband's bare statement that there were no sexual relations during the four menths in question we deem her testimeny on the subject far more probable and reliable than his. That a state of incompatibility arose between them cannot be doubted, but the cause of it has manifestly been concealed by both parties. If her testimony on the subject of their relations is to be accepted then the proof presents a case of desertion on his part instead of hers and the degree so far as based on the bill must be reversed.

At the same time we are not satisfied that cross-complainant

through ceasing him, that he is no langer arthy of her lave and that he had tracked her weres than a "drubberd." In a later letter she refers to his refusal to pay rest after October 1. and states the to me ruines her life ofter "playing crowd" with her for coven years; the also heed acod and layed to bim: thit he had rested her life and that she apply never toke him cack. It her leter letters she expresse a desire for a dispres and that wit of loom a misty painterstanded wash door a gold

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presented adequate proof, when all the testimony is taken together, that the parties had been living apart wholly sithout her fault. Thile she states in her cross bill that she is willing to return to her husband her letters written prior to the filing thereof indicate that she is not. She made no affirmative proof of living apart without her fault. (Bielby v. Bielby, 333 Ill. 478, 486.)

The case appears to have been tried in a manner not to bring out the real facts and, in our opinion, neither party made out a case. Accordingly the decree will be affirmed as to dismissal of the cross bill for want of equity and reversed as to granting a divorce on the bill, and the cause will be remanded with directions to dismiss the bill for want of equity.

AFFIRMED IN PART AND REVERSED IN PART.

Scanlan and Gridley, JJ., concur.

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33593

GUNNAR ANDERSON, a minor, by Sieverth Anderson, his next friend,

Appellee,

V.

JACOB LUDVIGSEN,

Appellant.

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APPEAL FROM SUPERIOR COURTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 16, 1929, following the verdict of a jury, plaintiff recovered a judgment against defendant for \$4750, in an action for demages for personal injuries. This appeal followed.

Plaintiff's declaration, to which defendant filed a plea of not guilty, consisted of six counts. In the first it is alleged that on September 2, 1927, defendant was driving his automobile northerly on State street, a public highway in Chicago. at or near its intersection with 84th street; that plaintiff was lawfully upon State street at or near the intersection and was in the exercise of ordinary care for his own safety; and that defendant so negligently operated his automobile that it struck or ran over plaintiff, whereby he was seriously and permanently injured, etc. The second count charged defendant with willful and wanton negligence. The third and fourth counts allege violations of the Motor Vehicle Act as to the rates of speed of such vehicles in residential and business districts in incorporated cities. The fifth count alleged a violation of an ordinance of the City of Chicago requiring vehicles, upon overtaking a street car stopped for the purpose of discharging or taking on passengers, to come to a stop, etc. The sixth count alleged that defendant negligently failed to keep a

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In addition to the general verdict against defendant the that jury returned a special finding to the effect/he was not guilty of willful and wanton conduct.

The testimony of plaintiff's many occurrence witnesses disclosed the following: On the morning of September 2, 1927, about 7 o'clock, plaintiff a boy of about 15 years of age, was a passenger on a north bound State street car. As the car approached 84th street he told the motorman, Watt, that he wanted to get off at that street. The motorman stopped the car at the regular stopping place, - the front of the car being a few feet south of the south cross-walk of 84th street. Upon the motorman opening the door plaintiff alighted and started for the sidewalk on an angle. Suddenly and without warning, and after plaintiff had taken a step or two. defendant's automobile, driven by him, came past the ear between it and the east curb of State street at a speed in excess of 25 miles an hour. A front part of the automobile struck plaintiff and he was carried, probably on the left front fender, clear across 84th street, where he fell off or was thrown off. When picked up his body was lying east of the car tracks and north of the north curb line of 84th street. The automobile, swerving a little to the right, ran over the northeast curb of the intersection and against a fire plug or hydrent with such force that the plug was bent over about a foot.

Defendant was the only occurrence witness called in his behalf. He testified that he was driving his automobile north in State street and travelling about 20 or 25 miles an hour; that he was trying to pass the street car on its right; that the boy stepped off the car and in front of the moving automobile when it was only a few feet away from him; that when he (defendant) saw the ear door

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open and the boy step out he applied his brakes and by turning the automobile to the right endeavored to avoid hitting him, and "then I went into the fire plug;" and that when the boy stepped out of the standing street car, its front and was about seven feet north of the south curb line of 84th atreet.

Defendant's counsel first contend that the general verdict, on the questions of defendant's negligence and plaintiff's contributory negligence, is against the manifest weight of the evidence. Both of these questions were for the jury to determine and we think that under all the facts and circumstances disclosed their verdict is amply sustained by the evidence and should not be disturbed.

(Stack v. East St. Louis Ry. Co., 245 Ill. 308, 310-11; Mulligan v. Andel, 245 Ill. App. 132, 140.)

Defendant's counsel also contend that the court committed error in giving, among the series of instructions, instruction No. 6, offered by plaintiff, as follows:

"In the absence of some warning or evidence to the contrary, the plaintiff, in the exercise of due care, had a right to assume that the defendant would obey the ordinance of the City of Chicago in evidence relating to the passing of street cars by motor vehicles operated on the streets of said city; and, if you find from the evidence that the street car from which plaintiff alighted was at that time stopped for the purpose of discharging or taking on a passenger or passengers, then the plaintiff, in the exercise of due care, had a right to assume in the absence of warning or evidence to the contrary that the motor vehicle operated by the defendant would not pass or approach within ten feet of said street car as long as said car was so stopped or remained standing for the purpose of discharging or taking on a passenger or passengers."

The ordinance of the City of Chicago (Municipal Code, 1922, Sec. 3825, p. 1056), upon which the instruction is predicated, was introduced in evidence by plaintiff without objection. In view of the practically undisputed evidence as above outlined we do not think that the court erred in giving the instruction.

Equally without merit in our opinion is counsels'

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further contention that the court erred in refusing to give instruction No. 3, offered by defendant. It directed a verdict for defendant and one of the assumptions of fact in it was that the street car did not stop at its regular stopping place at 84th street, while the undisputed evidence disclosed that the car had there stopped for the purpose of discharging a passenger or passengers immediately before the happening of the accident. For the court to have given the offered instruction would have been error. (Bullock v. Marrott, 49 Ill. 62, 65; Alton Lime & Cement Co. v. Calvey, 47 Ill. App. 343, 348; Chicago & Alton R. Co. v. O'Leary, 102 Ill. App. 665, 667.)

Counsel further contend that the verdict and judgment of \$4750 are excessive. We do not think so. After the accident plaintiff was taken to the Auburn Park Hospital and there given treatments for nearly four months. He was unconscious for the first four or five days. He suffered a cerebral concussion and a compound fracture of the tibia and fibula of the right leg. Parts of the bones were comminuted and, because of this and the fact that dirt and cloth had worked into the leg, an infection developed. Thereafter shall pieces of bone from time to time were removed from the leg. After his removal from the hospital plaintiff received daily treatments at his home for more than a month and thereafter occasional treatments for about a year. At the time of the trial in February, 1929, his leg was still being dressed about once a week because of continuing discharges from the small sinus. As a result of the accident there is a permanent shortening of the leg about 3/4ths of an inch and a loss of hearing in plaintiff's left ear of about 30 per cent. The hospital charges amounted to \$484.50, and the physician's charges \$1,000.

Counsel further contend that the court committed pre-

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plaintiff's exhibit 4, over defendant's objection, pieces of bone contained in a small box, which pieces Dr. Barnen, the attending physician, testified he had removed from plaintiff's leg. Insamuch as the jury's verdict is not excessive and there is nothing gruesome about the exhibit, we do not think that the court abused its discretion in allowing the exhibit in evidence and to be examined by the jury, or that any prejudice to defendant resulted. (Wagner v. Chicago etc. R. Co., 277 Ill. 114, 118; Tudor Iren Works v. Seber, 129 Ill. 535, 538-9; Bouer v. Knapp. 174 Ill. App. 533, 535; Seltzer v. Saxton, 71 Ill. App. 229, 234.)

For the reasons indicated the judgment of the superior court is affirmed.

AFFIRED.

Barnes, P. J., and Scanlan, J., concur.

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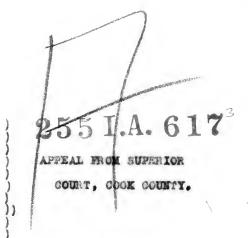
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33602

CHARLES L. AGME, Appellant,

To

ALVIN SABEL and BEN ZIVOF, copartners, doing business as Famous Garage, Appellees.



MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order of the Superior court, entered March 22, 1929, vacating a judgment for \$3,000 against defendants, entered after verdict upon an exparte trial had in the absence of defendants on April 6, 1928. The order is based upon section 89 of the Practice Act, which provides that all errors in fact in the proceedings, which by the common law could have been corrected by a writ of error coram nobis, may be corrected, upon written motion and reasonable notice, at any time within five years, etc.

Plaintiff's action was commenced in December, 1926, and the declaration disclosed a claim for damages on account of defendants' negligence in allowing plaintiff's Packard automobile, stored in their garage, to be taken away by a third party whereby it was wholly lost to plaintiff. Defendants filed a plea of the general issue.

The common law record discloses that during October, 1928, long after the term had passed at which the judgment in question was entered, defendants filed their motion to vacate it, and that during November, 1923, leave was given them to file an affidavit of their attorney, Julian J. Luster, in support of the

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The bill of exceptions discloses the grounds of the motion to vacate the judgment, viz., (a) "an error in point of fact, not appearing on the face of the record, has been committed through the default of the clerk of the court," and (b) the exparte hearing of the cause was due "to an accident and mistake of fact that the cause be continued to June 4, 1928," which was not known to the presiding judge, etc.

In Luster's affidavit be states that the cause had originally been assigned to the calendar of Judge Wells M. Cook. who because of sickness could not call the calendar, and the name from time to time was being called by a judge from outside of Cook county when acting as a superior court judge in this county: that on the morning of April 6, 1928, affiant appeared before Judge R. M. Fowler (then calling said calendar) and, in the absence of plaintiff's attorney, the cause "was continued to June 4. 1928." and thereafter affiant left the court room: that "all memoranda of continuances are kept by the minute clerk in each court room;" that on the afternoon of April 6th, "by accident, mistake or default of the clerk, calling the cases, or by some means unknown to affiants" the cause was heard before a jury ex parte and the judgment entered; that afterwards, on June 2, 1928, there appeared in the Chicago Law Bulletin, which publishes all court calls in Chicago, a notice that all cases set for trial for June 4th (election day) would be called on June 5th, and that under the name of Judge Harris (then calling said calendar) appeared a list of cases to be then called for trial, including the case of Agne v. Sabel; that on June 5th said case was called for trial by Judge Harris, and he ordered it dismissed for want of prosecution; that in the "daily dairy" of the clerk for the judge calling said

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calendar, and under date of June 4th, appeared the case (among others) of Agne v. Sabel as being set for that day; and that "had Judge Fowler known that an order had been entered, postponing the cause to June 4th, he would not have entered said judgment."

affidavit supporting it, is it stated what the particular "default" of the clerk was prior to the entry of said judgment, or that the cause was, on the morning of April 6th, continued to June 4th by any order of court. And the common law record does not disclose that any such order of continuance was entered. It will further be noticed that the statements in the affidavit as to the notice in the Law Bulletin, the clerk's diary and the proceedings before Judge Harris on June 5th all refer to happenings after the judgment in question had been entered.

To defendants' written motion to vacate the judgment plaintiff filed a special demurrer, setting forth various reasons why the motion should not be granted, among which in substance are that the court had no jurisdiction to vacate the judgment - the term having passed; that no such error in fact had intervened prior to the entry of the judgment as, under the provisions of the coran nobis statute, warranted the vacation of the judgment; and that the error relied upon for such vacation "did not intervene in said proceedings but arose subsequent to said hearing and judgment."

The bill of exceptions further discloses that on March 22, 1929, a hearing on the motion and demurrer was had before Judge Fowler, who had been the presiding judge at the trial resulting in the entry of the judgment; that on the hearing defendants presented Luster's affidavit and also an <u>unfiled</u> affidavit, not of record, of Harold Green, an assistant to Luster; that Green's affidavit was to the effect that he on the morning of April 6th was in court "when

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Luster made a motion for a continuance of the cause and the court ordered it continued to June 4th," and that at that time no attorney for plaintiff was present; that thereupon, before the court had made any ruling on plaintiff's demurrer, plaintiff, "to maintain the issues in support of his demurrer," introduced the testimony of Marcus J. Golden, plaintiff's attorney, and Lee L. Turoff, an assigtant in Golden's office; that Golden's testimony, corroborated by that of Turoff, was to the effect that the cause was on the trial call of Judge Fowler on April 4th and 5th, 1928, that he (Golden) was in that judge's court room on the morning of April 6th and before court convened at 10 a. m., that he remained there all the morning, that neither defendants nor any attorneys representing them were present. and that said cause was reached for trial about 11:45 a. m. and was thereafter and during that day tried before court and jury, resulting in the entry of the judgment; that thereupon, over plaintiff's objection, defendants introduced "a daily diary or continuance book, \* kept by the minute elerk of the court calling said calendar. and particularly certain items therein, under date of June 4, 1928, showing "a set of cases continued to that date among which appeared the title 'Agme v. Sabel;'" that thereupon, it appearing that said minute clerk because of illness was unable to testify in court, it was stipulated between counsel that, if present, he would testify that said dairy was the book in which he, as such clerk, kept a "record of continuances," and that the cases appearing under the date of June 4th in said book were entered by him "in the usual course of business upon the order of the court; that plaintiff's attorney objected to this testimony as being irrelevent and immeterial, which objection was overruled; and that thereupon the court entered the order appealed from vacating said former judgment. The court, in the draft order contained in the present transcript, states that "the cause coming

true, of the and the first properties of the contract of the collection and the track wetter of the contract of the car this can be such as all an enterest apar per a contra area acount a reference of the area and the area as a second acount end classifer as a blant in the control of the sale as puller yes to them will consider the terminate of the continues of the state of to between an election of the correst at the testion of mation of the Lains and the ten ten ten or will said the car of the fraction of the out two go Tree I . w. pill 'wh and deat , Tree , the ban (dulton) and the care of the state of the attraction of the state of the state of the state of "Marker and which trip cather, thank hand the time for the total and taken wrom mode hairs well a expanded a gas ron in what the resisting sads ARE ARE A STREET TREETON AND AND THE COOKS OF AN ARE SO TO A TO A ARE ARRESTED TEXAST THE STREET TROP TO THE DELETY WITH STREET STREET STREET NEW BIRE -mirig more, read the fact the factor of a contract of the con 网络美国大部港南南部城市 "你们 网络人名马尔 医真皮细胞 医原生性外腺性小皮质性毒素 放弃,一个时间的原,是经历是自己的意识的,我不是想是是 Treater for the w , while a true of the dear of the weight of the weight DARE or that the terms of the property of the form of the first of the BOYERS I MARKE MODE OF STAR OF STREET OF STEET OF STAR OF STARTED STARTS bin bills ' and an about ' was the course of a course of the course of t with a line of Milar we in temporal and temporal and the same according to well is also in a comment of the comment of the comment of the comment briogs of some and is desired as a set some relation of a second of year to the NOTE IN THE TEN A STATE BARANTA THE WAS TO SEEN THE STATE OF THE MESSAGE OF THE SEE SEEN - Command of the control of a control of the cont tight to the more we noting lither the war to be underly the chilton of THE RESERVE OF THE STREET STREET STREET STREET STREET, THE STREET STREET STREET 

on to be heard upon plaintiff's demurrer to defendants' motion,

\* \* and after arguments of counsel, \* \* said demurrer is everruled,

and it is therefore ordered that the judgment heretofore entered

herein be and the same is vacated."

We are of the opinion that the court erred in vacating said judgment of April 6. 1928. We do not find in the record any such error in fact as, under the provisions of section 89 of the Practice Act and decisions construing it, would warrant the court in vacating the judgment. No default or mistake of the clerk of the court prior to the entry of the judgment is shown, which was unknown to the judge and which, if known, would have caused him not to try the cause and not to enter the judgment. And it does not appear that prior to said trial and judgment. the court had ordered the cause continued to June 4, 1928. We regard defendants' motion and accompanying affidayits as an attempt to contradict the record of the court, which should not be allowed. Furthermore, if any default or mistake of the clerk of the court occurred after the day said judgment was entered, it cannot affect it. We think our holding is sustained by the decisions in Consolidated Coal Co. v. Oeltjen, 189 Ill. 85, 87; Cramer v. Commercial Men's Ass'n, 260 Ill. 516, 522; People v. Neonan, 276 Ill. 430, 434; Loew v. Krauspe, 320 Ill. 244, 250; and McCord v. Briggs & Turivas, 249 Ill. App. 516, 530. In last mentioned case it is said: "We think this review of authorities discloses that errors which can be corrected by motion under section 89 are only such errors of fact as go to the caparity of the parties or misprision of the clerk of the court which do not contradict the record and which if known to the court would

have prevented the entry of the judgment."

The order of the court of March 22, 1929, setting aside and vacating said judgment of April 6, 1928, is reversed.

REVERSED.

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MORRIS LAVINKIND,

Complainant and Appellee,

SILAS NOPP or ale.

On appeal of SHERIDAN TRUST SAFE DEPOSIT CO., a corporation, one of the defendants, Appellant. APPRAL FROM
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINIOR OF THE COURT.

The sole question involved in this appeal is whether the Court, following reports of the master, properly taxed certain sums as costs and properly adjudged that the Sheridan Trust Safe Deposit Co. (hereinafter referred to as the Sheridan Co.) should pay to complainant \$243 of said costs previously advanced by complainant. Complainant's motion to strike from the record the bill of exceptions of the Sheridan Co., and to dismiss its appeal, was reserved to the hearing.

Complainant's bill, filed October 1, 1926, sought to foreclose a second mortgage for \$6,000. Various parties claiming interests in the premises were made defendants and, after issues joined and after a hearing before a master and the filing of a report by him, the court on April 5, 1929, entered a decree of foreclosure. The court found that defendant, Theodore Bbert & Co., had a first liem on the premises for \$684.69; that complainant had a second liem for \$6,863.42, and \$750 for solicitor's fees; that subordinate thereto the Sheridan Co. had liens in the respective amounts of \$584.34 and \$868.93 by virtue of two judgments owned by it; and that the claims of Fred C. Bracken as assignee of

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Hugo Westerdahl, did not constitute liens.

Accompanying the master's report, filed November 16, 1928, is the effidavit of William J. Cleary, a stonographer and court reporter, to the effect that his office reported and transcribed the testimony taken in the cause, and that for such services he is entitled to the sum of \$348.30, which is the usual and a reasonable charge therefor; also there is the master's certificate of fees and charges for his services, as follows:

"Fees allowed by statute: Taking and certifying 1887 folios of testimony at 15g per folio

\$281.55

Pees to be fixed by the court:
Obtaining files, examining order of reference,
docketing case, setting same for hearing,
reading and considering pleadings and testimony,
and preparing report and authorities, over fifty
(50) hours

250.00

To fee for over ten (10) hours of argument

50.00

To fee for sending out draft of report and closing down same, five (5) hours

25.00

Total - \$606.55"

on the same day, November 16, 1928, the court entered a draft order in which it is stated that it was necessary to employ a stenographer in the taking and transcribing of the evidence before the master. And the court expressly approved said master's and stenographer's charges, aggregating \$954.85, and ordered that they "be fixed as costs, - the court reserving the question of taxing the same against the respective parties before the determination." This question was referred, apparently, to the master for a report and on April 5, 1929, he filed a report. The exceptions of the Sheridan Co. therete were overruled. The report is as follows:

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	1,595	284	1,877
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366 folios @ 15	per folio	54.90	
1/3 of argument	, atc	108.33	
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In the final degree of April 5, 1929, the court ordered that, unless the said sum of \$684.69, and interest, be paid to Theodore Doort & Co., and the said sum of \$6863.42, with interest. be paid to complainant, within two days, and also the costs of this suit, "including said fees for complainant's solicitors, and master's fees and stenegrapher's charges on the reference herein, which are hereby taxed at the sum of \$954.35," the premises be sold, etc. And the court further ordered and adjudged that "the sum of \$243. coet of reference, which includes the proportion of stenographic services incurred by the assertion of its claims by the Sheridan Co. and a proportionate part of the master's fees and expense. incurred by the assertion of its rights by said Sheridan Co., be paid to complainant by said Sheridan Co. (it appearing that said complainant has paid and advanced all of the costs of reference); and that, in case of the failure of said Sheridan Co. to pay to said complainant the said sum of \$243, so taxed against it as the fair perpertion of the costs, the said complainant, Merris

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Levinkind, have execution therefor against said Sheridan Co."

on the same day (April 5, 1929) the court allowed an appeal by the Sheridan So. to this appellate court from "that part of the order and decree of April 5, 1929, which docrees that complainant recover the sum of \$242.96 from the Sheridan Co. for costs assessed against said Sheridan Co.," - bend of \$500 to be filed within 30 days and bill of exceptions within 60 days. Within the required times the Sheridan Co. filed its bend, and also a bill of exceptions signed by the judge. The bill of exceptions discloses that the Sheridan Co. made two motions to re-tax the costs, - one on November 16, 1923, when the master's and stenographer's charges, aggregating \$954.85, were fixed as costs, and the other on the day said final decree was entered.

The statute relative to fees of masters in chancery, in force when said final decree was entered (Cahill's Stat. 1927, Chap. 53, Sec. 20, p. 1267) is in part as follows:

"For taking depositions and certifying, for every one hundred words, fifteen cents. For taking and reporting testimony under order of court, the same fee as for taking depositions. \* " In all counties hereafter masters in chancery may receive for examining questions in issue referred to them, and reporting conclusions thereon, \* \* such compensation as the court may deem just; and for services not enumerated above in this section and which has (have) been and may be imposed by statute or special order, they may receive such compensation as the court may allow. The court may also include as a part of such master's fees a reasonable allowance not to exceed fifteen cents per hundred words for stenographer's services in cases where the master shall certify that a stenographer was necessarily employed, and shall attach to his report a certified copy of the testimony taken by such stenographer."

counsel for the Sheridan Co., first contend that the taxing as costs of \$348.30 for the stenographic services is excessive, inasmuch as there were only 1877 folios, which at the statutory rate of 15 cents per folio amount to only \$281.55; and that in the subsequent apportionment made as to these costs to be paid by the Sheridan Co., viz., \$79.37, this amount is excessive to the extent of \$24.47, and

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for the reason that there were only 366 folios of "Sheridam testimony" taken, which at said statutory rate amounts to only \$54.90. We think that the contention has merit.

Counsel for the Sheridan Co. also contend that the items of \$250, \$50 and \$25 (aggregating \$325 for 65 hours of claimed extra time expended at \$5 per hour) as contained in the master's certificate of fees and charges above set out, and allowed by the court in said final decree, are excessive and improper. Considering the item of \$281.55, as properly charged by the master and confirmed by the court, we are of the opinion that said aggregate charge of \$325 must be considered as excessive, in view of numerous decisions of our Supreme Court. (See, Schnadt v. Davia, 185 Ill. 476, 485, et seg .: Manowsky v. Stephen, 233 id, 409, 415-16; Klekamp v. Klekamp, 275 1d. 98, 107-8; Rasch v. Rasch, 278 1d. 261, 273-4; Herpich v. Williams, 300 id. 540, 548-50; Kuchnie v. Augustin, 333 id. 31, 39-41.) We think that a reasonable charge for all of the services enumerated in said items would be \$150. One third of said \$150 is \$50; and, therefore, in the apportionment there can properly be charged against the Sheridan Co. \$54.90. \$50 and \$54.90. or a total of \$159.80, instead of \$242.96, as charged by the master and allowed by the court. And the final decree appealed from should be modified accordingly.

And we do not think that there is any merit in complainant's motion to strike the bill of exceptions of the Sheridan Co. and to dismiss its appeal. The bill of exceptions was presented to and signed by the judge within the time required, and discloses that the Sheridan Co. twice objected to the master's charges, taxed as costs, and moved the court to re-tax the costs, which motions were denied. Even though these objections and motions had not been made in the court below, the question whether the amounts taxed as costs in said final decree against the Sheridan Co. could properly be considered

for the reason that there were only ich folion of " harden testimeny" taken, which at nai, statutery rate assumes to only \$34.80. 's think that the contention has north.

Councel for the Sarilan Car also contend that the items of \$250, 980 and \$25 (ag rogating \$225 for \$6 hours of alatand catera time expended at 10 per hapr) as contained in the master's califtrees and ve bowalla her tree ter stock aver he but acct to washing in said final decree, are orecentwe and improper. Considering the light of 1821.55, as properly charged by the master and leaf loss to mast to extend utage man also the state of it of an are estates off to 2322 must be considered so exceeding, in view of superput decisions our bugrees Court. (See, beanadt v. osto, 185 ill. ord. 485, encount , a stored total total total to the total at Kranene a therese are see ale ale ale are entre en labour and the control of the control of "Liliand, 30 is. 560, 568-563 quelquis v. curuotio, vin ic. 31, 39interior and the first ear, the element of the series will be causerated in eald items would be 1800, the shird of maid ,180 is ed attended the exact tennesticance out at foreleast for togs throat r to . 00.80; has dos .00. 200, 200 and took and towings beared de Cist. 30, instant of the the control of the master and allowed bathton od hireds war's balary, we can't fait add to . Atuon and to a doubling Ly.

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on this appeal. (Keuper v. Mette, 239 Ill. 586, 594.)

appealed from, wherein the Sheridan Co. is required to pay to complainant \$243 of the costs as taxed, is reversed, and the cause is remanded to the circuit court with directions to so modify said decree that the amount of costs to be paid by the Sheridan Co. to complainant is \$159.80, instead of \$243. The costs in this appellate court will be taxed against the appellace, Levinkind.

REVERSED AND REMARDED WITH DIRECTIONS.

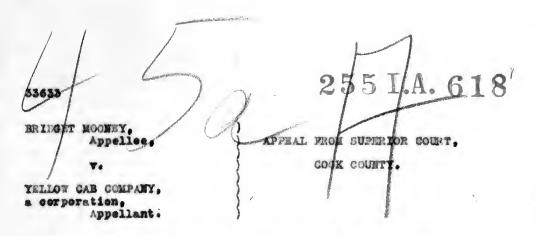
Barnes, P. J., and Scanlan, J., concur.

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Barnes, ". J., and Ronalan, J., unnant.



MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

The Yellow Cab Company prosecutes this appeal from a judgment for \$12,500, rendered against it after verdict by the superior court of Cook county in an action for damages for personal injuries received by plaintiff on the night of June 16, 1927, while she was riding as a passenger in one of its taxi-cabs. Harry Mathan was made a co-defendant with the cab company but as to him the jury returned a verdict of net guilty.

Plaintiff's declaration consisted of four counts. In
the first it is alleged that on the night mentioned (about 11:30
p. m.) plaintiff was a passenger in a taxi-cab owned and operated
by the cab company; that the driver was driving the cab in an
easterly direction on Lexington street in Chicago and was attempting
to cross the intersection of that street with Sacramento Boulevard,
a north and south boulevard; that Harry Hathan was driving his
automobile northerly in the boulevard and was attempting to cross
the intersection; that defendants so negligently drove and operated
the respective automobiles that they collided in the intersection;
and that thereby plaintiff, who at all times was in the exercise of
due care for her own safety, was seriously and permanently injured.
The second count in somewhat different language charged defendants
with negligence, generally, in the operation of the automobiles.

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The third charged that defendants negligently drove the respective automobiles at excessive rates of speed in violation of the statute. In the fourth count it is alleged that Sacramento Boulevard at Lexington street was a designated street for preferential traffic and that all vehicles, before entering into or crossing the boulevard, were required to come to a stop; that the driver of the cab before entering the intersection did not stop it but negligently kept on going across the intersection; and that in consequence thereof, together with the failure of Nathan to exercise ordinary care under the circumstances, the collision occurred causing plaintiff's injuries.

The cab company and Wathan filed separate pleas of the general issue, and the cab company a special plea denying possession or control of the particular taxi-cab.

On the trial plaintiff, to meet the defense of the cab company as made in its special plea, called as her first witness the driver of the cab, Alfred Fegstad. He testified that at the time of the accident he was employed by the cab company to drive the particular cab and that plaintiff was then a passenger in it. Upon being further asked on direct examination to state how far away from him was the other automobile when he first noticed it, he volunteered the statement that he first saw it when he was "at a stop" (objected to by plaintiff's attorney as not responsive) and then answered the question by stating that when he first saw the automobile "it was approximately 300 or 350 feet away, was going about 30 to 33 miles an hour, and was going that fast when the collision occurred." On eross-examination by the attorney for Nathan, he testified that "I saw the other car all the time while I was crossing;" that it was to "my right;" that "when I was about half way across the boulevard he was perhaps 125 to 150 feet away from me;" and that "at the time I was struck I was going probably about five miles an hour." On

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"At the time the other ear hit me, the front wheels of my car were
past the east curb of the boulevard; \* \* my car slid around to the
north side of Lexington street, hitting the north curb of Lexington
street with the rear left wheel; I was about in the center of the
right half of Lexington street at the time my car was hit; \* \* when
my car came to a standatill it was east of Sacramento Boulevard."

Plaintiff, testifying in her own behalf, stated that after attending a theater with her daughter, Pansy Mooney, they boarded the cab at Kedzie avenue and Madison street, instructing the driver to take them to their home at 2918 Lexington street, which is a short distance east of Sacramento Boulevard; that plaintiff occupied a seat inside on the north or left side of the cab and her daughter a seat at her right; that when the cab, going east on Lexington street, reached the boulevard it did not stop; that as it was crossing the boulevard plaintiff did not notice any automobile entering the intersection from the south; that suddenly the cab was hit on its right side by another automobile and there was a crash and she lost consciousness; that when she recovered consciousness she was still in the cab; and that afterwards she was taken to the Robert Burns Hospital where she received treatment and an X-ray picture of her shoulder was taken during that night.

Plaintiff's daughter textified on direct examination that she was familiar with the intersection and its surroundings; that there were boulevard stop signs there, - permanent red lights with the word "Stop;" that the eab did not stop before entering the boulevard intersection; that while it was in the intersection there suddenly was a crash and she became unconscious; that she was awakened by hearing her mother's cries, while they were still in the cab; that she noticed that the glass on the right side of the cab was

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the hospital where both received treatment. On cross-examination she further testified that the mext morning, while she and her mother were in nearby beds in the same ward in the hospital, a Mr. Murphy called and asked for information as to the accident; that she gave him an account of it and he wrote it down in the form of a statement and then read it to her; that she then at his request signed it, but did not read it; that she told him the cab did not step before entering the intersection and that it was struck by the other automobile in the intersection; and that at the time of his call her mother (plaintiff) did not speak to him and he did not read the statement to her (plaintiff) or talk to her about the accident.

Robert E. Goldenberg, plaintiff's witness, testified that he was driving his automobile, the second car behind Nathan's, north on the boulevard; that he noticed that the yellow cab upon reaching the intersection from the west did not stop; that, proceeding easterly with undiminished speed of about 25 miles an hour, it ran right in front of Nathan's car, which struck it near its center; and that the cab "was thrown against the northeast curb and remained upright."

Henry Mathan, testifying in his own behalf, stated that he approached and entered the intersection at a speed of about 15 or 20 miles an hour; that he first noticed the cab, attempting to pass in front of him, when it was about 10 feet away and to his left; that he quickly applied his brakes and, though the cab swerved a little to the north, he could not avoid hitting it; and that there was a boulevard step sign on the southwest corner of the intersection.

The cab company did not call any witness to the accident.

Two police officers, who went to the scene of the accident and afterwards to the hospital to make investigations, testified for it, as

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vestigators. Murphy testified as to the procuring of the signed statement as to the accident from plaintiff's daughter, on the morning following, at the hospital. This paper, introduced in evidence, contained statements that "at Sacramento boulevard the cab stopped and started slowly crossing the boulevard; that when we were nearly over the north drive of the boulevard, a northbound auto, travelling very fast, ran directly into the center of our cab; " that my mother's collar bone was fractured and her back injured." In rebuttal, plaintiff's daughter testified that it was not true that the cab stopped at the boulevard before entering it, that she did not so state to Murphy, and that when Murphy read over the statement to her, before she signed it, he "did not read that it stopped at the boulevard."

Counsel for the cab company first contend that plaintiff cannot recover because the evidence does not affirmatively show that she was in the exercise of ordinary care at the time. The argument is in substance that she, a passenger inside the cab, should have noticed that the driver did not stop before entering the boulevard; also, that she should have noticed the other automobile approaching the intersection from the right; that she should have warned the driver of the danger; and that she was negligent in not so doing. There is no merit in the contention or argument. (Hoffman v. Yellow Cab Co., 258 Ill. App. 269, 270-1; Hickey v. Chicago City Ry. Co., 143 Ill. App. 197, 209-10; Heiz v. Yellow Cab Co., 248 Ill. App. 609,614-15.)

Counsel also contend that the verdict against the cab company on the question of the negligence of the driver of the cab is not sustained by a preponderance of the evidence. We cannot agree with the contention. On the contrary we think that the evi-

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dence clearly shows that the driver of the cab was guilty of negligence, first, in not bringing his cab to a stop before entering the boulevard intersection and, second, after having entered it, in attempting to cross it in front of the other automobile, which he saw was entering the intersection and approaching from his right. Even if it could be believed that the driver of the cab did bring it to a stop before entering the intersection it is clear that his negligence, in attempting to pass in front of Mathan's car, which he says he saw "all the time" and which had the right of way, preximately caused the accident.

Dr. Graham, plaintiff's witness and the family physician, after he had testified to certain existing conditions as to plaintiff's shoulder and back observed during many treatments after she had left the hospital, to further testify that in his opinion those conditions were permanent. In view of all the medical testimony introduced, including that of the cab company's witness, Dr. Blaine, and other testimony, we do not think that the admission of the testimony complained of constituted reversible error. Nor do we think that the admission of extain testimony of plaintiff's expert medical witness, Dr. Scott, relative to the limitation of motion of one of plaintiff's arms which he had observed on a test, was error, for the reason, as contended, that such apparent limitation could partially be controlled by acts of the patient, and that the symptoms and conditions mentioned were of a subjective rather than an objective character.

Counsel also centend that the court erred in giving to the jury instruction No. 6, offered by plaintiff, which told them that, while she must prove her case by a preponderance of the evidence, "still the proof need not be the direct evidence of persons who know the facts or things sought to be proved," but that "facts THE PRINTER OF COME OF COME SOME SOME APOST VIT SEE SOME SOME VALUE OF COME OF

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may also be proved by circumstantial evidence," etc. The argument is that "there was not any circumstantial evidence in the case tending to prove any fact in it," and that hence the giving of the instruction was error. We do not think there is any merit in the contention or argument, because, as we read the record, there was much evidence which may be deemed circumstantial. Furthermore the instruction, in substantially the same language, has frequently been approved by our Supreme Court. (See U. S. Brewing Co. v. Steltenberg, 211 Ill. 531, 535.)

Counsel also contend that the verdiet of \$12,500 is so excessive as to indicate that it was the result of passion or prejudice. We do not think so. Plaintiff was rendered unconscious for a few moments after the collision. While in the hospital about two hours later she vomited and then and thereafter suffered from headaches and pains in her shoulder and back. She was in hed at. the hospital for about two weeks, when she was conveyed to her home and remained in bed there for an additional two weeks. While in the hospital she was treated by Dr. Boland, resident physician there. He testified that there were many bruises on the body, bruises about the head with evidence of concussion, a wrenched and aprained shoulder, and a fractured collar bone. The charges of the hospital. including physician's fees and K-ray pictures taken, were \$400. Dr. Graham testified that he treated her at her home from July 8 to November 2. 1927, making 28 calls in all; that she complained of dizzy spells and pains in the head and back; that she was in bed part of the time; that the restriction of the motion of her arm was about one-half; that there was tenderness upon pressure in the back and along the spinal column; and that these conditions were present when he ceased treating her. Dr. Scott testified that he took X-ray pictures of her head, right shoulder and lumbar spine in October, 1928; that the

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X-ray pictures of her skull showed "a V-shaped fissured fracture line;" that the picture of the shoulder showed "the collar bone fragtured at the junction of its middle and outer thirds, with the inner end of the outer fragment displaced downward, and riding under the other fragments, of approximately one inch;" that while the picture of the "small of the back" does not show any fracture there, it indicates a "condition of rarification and absorption;" that at the same time, by physical examination of the patient, he could feel deformities of the right collar bone or clavicle; that by palpating or moving the right arm he "was unable to get the arm any higher than approximately at a right angle;" and that this condition was caused by the "changes in the shoulder joint and the overriding and shortening of the collar bone of approximately an inch." Plaintiff, 61 years of age, testified on the trial in January. 1929, that she still was troubled with dizzines, and pains in her head, so much so that frequently she had to "grab semething to keep on my feet;" that before the accident she never had any sickness or any limitation in the movement of her arm, but that now she cannot raise it; and that before the accident she did much of the housework, except the washing, and that now she cannot perform housework. As to her present inability to perform housework she was correborated by the testimony of her daughter. In view of this testimony as to her injuries, suffering and present disabilities, all resulting from the accident, and also considering the present purchasing value of the dollar, we are unable to say that the jury's verdict is excessive.

Complaint also is made of a certain remark (etricken out by the court) made by plaintiff's attorney in his opening statement to the jury and also of other remarks made by him in his arguments to the jury after all the evidence had been heard. The argument is that these remarks prejudiced the jury against defendant and accounted for the

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claimed excessive verdict. Molding, as we do, that the verdict is not excessive we cannot say that the remarks, though some of them may be considered improper, constitute such prejudicial error as warrants a reversal of the judgment. On the entire record we think that the verdict and judgment do substantial justice between the parties.

The judgment of the superior court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

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JACK BRUSK, Defendant in Brror,

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IRVING ROYACK, L. AFREMOT, MAX GELTHER and E. H. COFFMAN, Plaintiffs in Error. 2551.A. 618

COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ plaintiffs in error seek to reverse a judgment for \$5324, entered against them on October 27, 1928, after verdict in the municipal court of Chicago. Shortly after the issuance of the writ the appearance of defondant in error was entered by the same firm of attorneys who had instituted the original suit for him in the municipal court, but no brief has here been filed in his behalf.

The original suit, commenced on November 22, 1926, was against plaintiffs in error and two others, Arthur F. Krone and Chester W. Krone, as endorsers upon two promissory notes, each for \$2500, and dated respectively at Miami; Florida, March 25th and April 5th, 1926; each signed by Kissimmee Lake Developers, Inc., by two of its officers; and each payable ninety days after date to the order of plaintiff at Miami Bank and Trust Co., with interest at 8 per cent per annum after date. In the body of each note is the clause that "the maker and endorser of this note jointly and severally further agrees to waive demand, notice of non-payment, and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection." Four of the endorsers (plaintiffs in error) were duly served with process and filed affidavits of merits, but the two Krones were not served.

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In plaintiff's statement of claim, after stating the execution and delivery of the notes at Niami, Florida, he alleged that defendants' signatures as endorsers were on the back of each note when delivered to him; that the maker did not pay them when due, although each was presented for payment at said bank on the due date; that defendants waived the necessity of demand upon the maker and notice to defendants of the fact of the non-payment by the maker; that prior to the commencement of this suit defendants paid to plaintiff \$600 on the principal sums due; and that the balance of the principal sums is now due to him, together with accrued interest.

In Royack's affidavit of merita, while admitting that he endoraed the notes, he alleged that they "were deposited with plaintiff upon the express conditions that Abraham Jaffe and Frank Messer were also to endorse said notes and become jointly liable with this defendant and others on said notes," and that, in the event said Jaffe and Messer failed to endorse them, the same "were to be cancelled and destroyed;" that Jaffe and Messer did not endorse them; that this defendant has no knowledge of their delivery to plaintiff, or that \$600, or any sum, was paid to him on account; and that this defendant is not indebted to plaintiff in any sum.

Afremow's affidavit of merits, filed May 7, 1927, is substantially to the same effect.

In the amended affidavit of merits of Coffman and Geltner, filed October 18, 1928, they admitted the execution of the notes and their respective endorsements thereon; stated that they had no knowledge that the notes had been presented for payment or that the maker had not paid them; and denied that they had ever waived notice of non-payment by the maker, or that \$600 had been paid by them, or that they had ever otherwise recognized any liability upon the notes. They further alleged that plaintiff and one Sam Goldman were sales agents of said corporation, Kissimmes Lake Developers, under the arrangement

In pinintiff's elatement of cinim, after stating the exacution and delivery of the notes at high; Pierica, he alleged that defendants' signatures as expensers were on the back of each note when delivered to him; that the maker lift met pay them when due, although each was proceeded for payment at said bank on the due date; that beforeasts valved the necessity of demand upon the maker and metter to defendants of the fact of the non-payment by the maker; that prior to defendants of this oute defendants paid maker; that prior to the principal swas due; and that the balance of the principal swas due; and that the balance of the principal swas due; with actrees interest.

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or any sum, was paid to him as account and that this diendant is more indexe to plaintiff in any sum.

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that, as to all sales made by them of the subdivided land owned by it, said corporation was to receive 55%, and plaintiff and Goldman were to receive 45%; that plaintiff and Goldman desired an advancement to them by the corporation of \$5,000, with the further understanding that repayment of the sum should be made out of the first moneys received from sales of said land; that the stockholders of the corporation consisted of Coffman, Geltner, Afremow, the Kromes, Abraham Jaffe and Frank Messer; that it was agreed with plaintiff that, if the corporation would execute the notes, said stockholders would enviorse the same, and that plaintiff was to secure the endorsement on the notes of all of said stockholders, including Jaffe and Messer, and that if the endorsements of all were not produced the notes should be cancelled; that plaintiff failed to secure the endorsements of Jaffe and Messer; and that these defendants are not indebted to plaintiff in any sum.

On the trial in October, 1928, plaintiff, a resident of Payton, Chio, was a witness in his own behalf. After introducing the notes in evidence he testified in substance that he received them on the days of their dates from Chester ". Krone, treasurer of the corporation; that the signatures of the six defendants then appeared on the back as endorsers; that for each note he gave to the corporation a check for \$2,500, which checks were subsequently cashed; that the corporation never paid him anything on the notes; but that after maturity he received \$600 from three of the endorsers - \$350 from Afremew, \$150 from Chester 3 . Krone and \$100 from Coffman. Egel of the four defendants, who had been served with process, testified in support of their defenses. In rebuttal Nathan Haffenberg, one of plaintiff's atterneys, testified; plaintiff gave further testimony; portions of the depositions of Lawrence Rabinowitz and Sam Goldman were read to the jury; and certain writings were introduced. At the conclusion of all the evidence, and after the jury had been in-

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structed by the court, they returned a verdict finding the issues against the four defendants (plaintiffs in error) and assessing plaintiff's damages at \$5324. The judgment in question followed.

We refrain from further outlining the evidence because we have reached the conclusion that the judgment must be reversed, and the cause remanded for another trial, on account of erroneous instructions given by the court on behalf of plaintiff. Among the given instructions are the following:

11. The Court instructs the jury that if you believe from the evidence that the notes were delivered to the plaintiff with the understanding that the plaintiff was to necure additional endorsers, then you are instructed to find the issues for the plaintiff.

12. The Court instructs the jury that if you find from the evidence that at the time the notes were delivered to the plaintiff in this case, that the same were complete and no further or additional signatures were to be obtained other than the endorsers, now on said note, then your finding should be for the plaintiff."

These instructions each directed a verdict for plaintiff and neither contained all of the facts and conditions which, under the issues made by the pleadings, would justify a verdict for him.

In <u>De Stefano v. Associated Trust Co.</u>, 318 Ill. 345, 348, it is said:

\*Where an instruction directs a verdict for either party, or amounts to such direction in case the jury shall find certain facts, it must necessarily contain all the facts which will authorize the verdict directed. (Pardridge v. Sutler, 168 Ill. 504)\*. And such erroneous instructions, directing a verdict, cannot be cured by other instructions.

(Illinois Iron & Metal Co. v. Teber, 196 Ill. 526, 531.)

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

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255 I.A. 618

FRANK OTT,

Appellee.

L. F. HANNEL and
IDALINE R. HANNEL,

Appellants.

MR. JUSTICE ORIBLEY BELIVERED THE OPINION OF THE COURT.

In an action in contract based upon a promissory note defendants, on May 17, 1929, moved to strike plaintiff's statement of claim from the files but the motion was denied. They elected to stand by their motion and refused to plead, and thereupon the court defaulted them for want of an affidavit of merits and entered judgment against them for the amount of plaintiff's claim, \$838.20. The present appeal followed. Plaintiff has not filed a brief in this court.

The action was commenced on April 19, 1929. Plaintiff alleged in his statement of claim that his claim "is for the principal amount of \$700, and interest thereon at 6% from December 18, 1925, upon a note executed by defendants and delivered to the Sheboygan Loan & Trust Company" (copy of note attached); that the note "was negotiated and assigned to him by the Sheboygan Loan & Trust Company for a valuable consideration on December 27, 1918; and that he is the actual, equitable and bons fide owner thereof."

The copy of the attached note purports to be one signed by both defendents, dated December 18, 1918, whereby for value received they promised to pay six years after date to the Sheboygan Loan & Trust Co., or order, \$700 in gold coin, with 6% interest from date until paid, etc. The note does not bear any endorsement by the payer. Plaintiff's affidavit, accompanying his statement of claim,

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The maje of the care of the parties when the parties is the care of the care o

is as follows:

"State of Wisconsin County of Sheboygan ) es. Frank Ott, being first duly aworn, on oath states that he is the plaintiff in the above entitled cause; that he has knowledge of the facts; that the said cause is a suit upon a contract for the payment of money; that the nature of plaintiff's demand is as stated; and that there is due to plaintiff from defendants, after allowing to defendants all their just credits, deductions and set offs, the sum of \$838.20. (signed) Frank Ott

Subscribed and sworn to before me this 16th day of April A. D. 1929 (Signed) Kenry A. Ditling Hotary Public. - Wis."

The notary's seal is affixed to the paper but he does not certify that he is authorized to administer eaths in Wisconsin by the laws of that State.

We are of the opinion that the court erred in not granting defendant's motion to strike plaintiff's statement of claim from the files and that the judgment appealed from cannot stand. As the note does not bear the endorsement of the payee it is evident that plaintiff seeks a recovery in his own name on the theory that he is the assignee and the equitable and bona fide owner of a chose in action. It is provided in part in section 18 of our Practice Act (Cahill's Stat. 1927. p. 1944) that "the assignee and equitable and bona fide owner of any chose in action not negotiable, heretofore, or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit where pleading is not required. allege that he is the actual bons fide owner thereof, and set forth how and when he acquired title; \* \* . " He does not so allege in his affidavit and, hence, his statement of claim and accompanying affidavit does not state a cause of action under the statute. (Madison & Medzie State Bank v. Old Reliable Motor Truck Co., 236 Ill. App. 442, 444; Allis-Chalmers Mfg. Co. v. Chicago, 297 Ill. 444, 450; Gallagher v. Schmidt, 313 Ill. 40, 44.) Furthermore, plaintiff's statement of claim is not accompanied by any valid affidavit. The claimed affidavi-

is an follows:

"(tate of Biscousin be County of Cheboygen)
City of Shoboygen ) so. Frank Utt, being fixet duly evern, on eath elates that he is the plaintiff in the above entitled course that he has knowledge of the fracts that the paid course in a contract for the payment of money that the nature of plaintiff's demand to as stated; and that there is due to plaintiff from defendants, after allowing to defendants.

All their just credits, decartions and set offs, the own of \$508.20.

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Subscribed and autra to before me this leth day of April 6. 1. 1920 (Signed) Seary A. Litting

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of Frank Ott (plaintiff) appears to have been sworn to before a motary public in the State of Wisconsin but that notary has not made any certificate of his authority to administer oaths under the laws of that State (Desnoyers Shoe Co. v. First National Bank, 188 Ill. 312, 318; Ferris v. Commercial National Bank, 188 id. 237, 241; Smith v. Lyons, 80 id. 600.)

The judgment appealed from is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Seanlan, J., concur.

of Final Ott (plaintiff) appears to have been score to before a setary public in the State of state of security to nominister section ander and contistents of his suckerity to nominister section under the have of that State (Security Subjects State Sta

remented.

BEYEL TOD AND PRANKETON

Barres, F. J., and condens, J., comment.

UNITED STATES WICKER PURBITURE CO., a corporation, Appellee.

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LAKESIDE UPHOLSTERING CO., a corporation,

Appellant.

255 I.A. 618<sup>4</sup>

COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURS .

In a first class action in assumpsit there was a finding and judgment, June 18, 1929, against defendant for \$1,028.75, and this appeal followed.

In plaintiff's statement of claim, filed March 23, 1929, it is alleged that defendant is indebted to it in the sum of \$1,028.75 for certain goods and merchandise (furniture) sold and delivered. There is attached an itemized statement of the furniture (showing the sale price of the several pieces) and the usual affidavit of plaintiff's claim.

appearance, "for the sole and only purpose of moving to dismiss and abate the action." In its amended affidavit, in support of the motion made, it is stated in substance that plaintiff is a corporation of the State of New Jersey and there incorporated for the purpose of doing a general wholesale furniture business, with principal place of business at Hoboken, New Jersey; that it is not, and was not at the time of the commendement of the suit, either licensed to do business or incorporated in the State of Illinois; that it "is doing business within this State without a license;" that "all the transactions referred to in its statement of claim were transactions completed in Chicago, Illinois;" and that, therefore, it has no right to maintain

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and judgment. Jeno 14, 1928, egainst defendent for \$1,028.75, and this appeal followed.

In plaints's own enemt of claim, sides hards 2, 1479, it is alleged that the extract was and it is alleged that he extract was independent for correct modes and acressed (farmings) and here is a said of the correct was the farming the said prior of the correct pieces) one when what of plaints's another.

a suit in any court of record in Illinois. Subsequently defendant was given leave to file, and filed, certain interrogatories to be answered by plaintiff. The answers thereto were to the effect that at the time of commencement of the suit plaintiff was not incorporated in Illinois, and had no certificate of authority to do business in this State.

Subsequently on the issue raised by defendant's said motion, and affidavit in support thereof, there was a hearing before the court without a jury. This was had in accordance with Rule 12 of the Municipal Court, which is contained in the present transcript certified by the judge, as follows:

"Rule 12. There the defendant desires to set up matters in abatement or question the jurisdiction of the Court, he shall present the same by a written motion specifying the grounds thereof, and support the same by an affidavit except where the matters relied on to support the motion appear of record. If such motion raises as issue of fact dehors the moord the Court shall hear evidence presented by the respective parties, provided, that if a jury be demanded the matters shall be set for immediate hearing."

On the hearing on the motion defendant introduced a certified copy of the certificate of incorporation of plaintiff in the State of New Jersey, and plaintiff's answers to said interrogatories.

Jacob Zake, president of defendant, testified for it at considerable length and certain other writings were introduced. Thereupon plaintiff called said Zake as its witness under section 33 of the Municipal Court Act and he gave further testimony. Plaintiff also introduced certain letters, statements and other writings. At the conclusion of all the evidence the court denied defendant's motion to dismiss and abate the action.

Thereupon defendant moved (1) for leave to amend its special appearance so that the same stand as a general appearance, and (2) for leave to file its effidavit of merits to plaintiff's statement of claim and for a further trial. Both of these motions were overruled and thereupon the court without any further hearing

a suit in ay court of r.cord in Hilmets. We open and cried to he was given leave to file, and fill., certain inter a ateries to he asserted by plaintiff. The angeneral thereted were to the office that at the component of the time of components of the time of components of the time of components of the time of controls. The restricts to business in the tate.

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Rule 12. Bere the defend of delice to del up whiters in abatement or provider the file for the total of the country of the country of the same by a critise mation appelled the file prounds the purity and support the same by a critise action of the country of the same of the same of the country of the same of the same of the country of the same of the same of the country of the same of the same of the same of the country of the same of the same of the country of the same of the same of the country of the same of the country of the same of the same of the country of the same of the same of the country of the same of the same of the country of the same of th

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entered the finding and judgment as first above mentioned.

Defendant's counsel first contend that the court erred in refusing defendant's motion to dismiss and abate the action. The argument is in substance that on the question whether plaintiff prior to the commencement of the suit had been doing business in Illinois without a license and in violation of the law of this State, the Court's action is manifestly against the weight of the evidence. We do not think there is any merit in the contention or argument. It appears from the evidence in substance that in September, 1928. one B. M. Young was in the wholesale furniture business in Chicago. with an office and show room in the american Furniture Mart buildings that during that month he called upon Take, president of defendant. represented himself to be a selling agent for plaintiff, and solicited the purchase by defendant of certain furniture, according to samples on display in said show room; that Make went there and made selections of certain furniture at certain agreed prices, and directed that shipments be made by plaintiff from its place of business in Hoboken, New dersey, to defendant's place of business in Chicago: that in accordance with these directions Young, on his own stationery, under date of September 18, 1928, sent an order to plaintiff at Hoboken, directing it to sell and ship by freight from Hoboken to defendant at Chicago certain furniture at certain enumerated prices, the samebeing in accordance with Take's selections; and that thereafter all the furniture, as ordered and selected by Sake, was shipped by plaintiff from Hoboken to defendant at Chicago and was duly received by it. During the hearing defendant's attorney said: "We admit we received all the goods." No contention was made that any of the prices charged for the furniture was incorrect. Zake, however, gave testimony to the effect that his arrangement with Young was that the furniture was to be shipped on consignment as distinguished from an absolute

entered the finding and jud, ment as first above mentioned.

pages drapp and deal bordens such Longues a dealasted anotton all other born aging in a solder a drade both a design al The argument is in the entrange of the contraction of the transfer prior to the commencent of the cult had been coing curious in Illinois without a license and un violetien of the let of this take. . spec. hive set t. le lation ads deminte the arithme at notion at tweet est so do not chian there is any marit in the contention or grandent. It appears from the evidence in substance that in appears 1988. one B. M. Young was in the whole sale furniture business in chicaca. with an office and show rose in the most care there there but blinds thet during that a south he celled ager outs, president of day out of 我的表生也是主要的 我们的人,这个是这个人是是一个人的一个人,我们也没有一个人的人,我们也没有是一个人的人,我们是这个人的人, and stands of the colour of the colour of the colour of the second of the stands of an display is and above town in all and the conditions of water being alootions of cortain furnities to cortain agreed prioces, and aircoine to a culsus mester be suche by plainoiff from the place of business. in appear, sew BERNING C AND BLOOK BEEN BERNING IN CONTINUE OF THE CONTINUE O with these directaons form, , on his own sendiments, under the or region 18, 19.3, 2 nt an arder to plaintiff at februar, rin all resident and a kell of a descript, the and wakkers, our conjugates of although here is so sta ri palecone. Ha coming peda come alestro de mariaral alestro will all the officers and him have timed and always while weathings and mary, including a group for a supplication of a course of a course of the course of th Mobaken to defendant at which one or new or the transfer of the the province of clarate and control reactions of the authority of the control of the goods " Fe continuities as a summer of the second of " who as the real restaurance of for the furniture was incorrect, leave herever, gave to tracking affect that ale arresignation of the control of the control of the control of was to be ablunce on construct so distributions from an abusista

There was other evidence tending to show that there had been an absolute sale by plaintiff to defendant of all the furniture so shipped and received. No further evidence than the above was offered by defendant in support of its said contention that plaintiff had been doing business in Illinois in violation of the statute of this State. We think it clear that the above enumerated transactions between plaintiff and defendant were interstate commerce transactions. and that because of them plaintiff cannot be considered as having dome business in Illinois in violation of said statute. In McKenna Steel Working Co. v. Harris Brothers Co., 228 Ill. App. 363, 368, it is said: "It has been repeatedly held in this State that where a foreign corporation has no established place of business of any kind in the State, and carries on no local business but merely sells its merchandise, through the instrumentality of soliciting agents or drummers, and delivers the same through common carriers in the ordinary course of business, such corporations are not transacting business in this State within the meaning of the statute." (citing Lehigh Portland Cement Co. v. McLean, 245 Ill. 326, and other cases.)

Equally without merit, in our opinion, are counsels'
further contentions that the court erred (1) in overruling defendant's
motion for leave to file a general appearance, and (2) in overruling
its motion for leave to file an affidavit of merits to plaintiff's
statement of claim and for a further trial. Befondant's appearance,
though denominated "special," was a general appearance, and, hence it
cannot be considered error for the court to have refused to allow
defendant to do something which it had already done. Defendant did
not question the jurisdiction of the court to hear the cause. In
Kunde v. Prentice, 329 Ill. 82, 86, it is said: "A special appearance
must be for the purpose of urging jurisdictional objections, only, and
it must be confined to a denial of jurisdiction. (Micholes v. People,
165 Ill. 502.) An appearance for any other purpose than to question

eals. There was other vittemes temiling to show the tiltere had been an absolute sale by plaintiff to defendent of all the furniture we shipped and reselved. Be turker reidence the above was This index i will and inview: bloom with he inverges of invergent and becomes had how a coing business in 'Illieds in vist vien of one statute of emple the training of the contract of the cont between plainiff and orecall ore; the make the make or and or the links of many androni an barrianno of four of literatuly made in symbol 1 of her from anything at a strange of the color of a contill at accordant milence a capting of the effect while it birs, whose ever seed the thick corporation has no eathlished place of business of may wind in the -mail of the series and accord backers out mercant confidence and series and series dies, through the transmitality of salisiting godbs or dramaria. WHITE THE THE THE PROPERTY OF THE REST CLUB CALL THE PROPERTY OF business, when corporations are not trans oring business in this brailed finite, wonders ". outside and to present and ministr and Compatible was performed Cilla face only other commit

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the jurisdiction of the court is general." And, by the common law rule followed in numerous decisions in this State, where an issue of fact is made upon a plea in abatement and the issue is found against the defendant, the judgment is quod recuperet for plaintiff, and not one of respondent ouster. (Brown v. Illinois Central Inc. Co., 42 Ill. 366, 369; Greer v. Young, 120 id. 184, 191.) In the Greek case it is said: "If the plaintiff is successful upon such issue, the judgment is quod recuperet. It is therefore to him a valuable right to have the issue thus made up and tried. To permit the defendant to try an issue of this kind on affidavit, as was done, gives him a decided advantage, for if he fails, his metion would be simply overruled, and he would still have a right to a trial on the merits. To permit a part / to thus speculate on the chance of succeeding on a purely technical ground, without incurring any risk, and without any compensation to the plaintiff in case of failure, is contrary to the spirit of the common law, and is in direct conflict with the decisions of this court." (citing cases) And we do not think that section 45 of the Present Practice Act has changed the common law rule, as here applicable. It is therein provided that "if the issue on any plea in abatement is the truth of a statement in the return on the summons, or that the defendant is sued out of his proper county, or is not subject to suit in the county in which the suit is brought, or that the court has no jurisdiction over the person of the defendant, and such issue is found against the defendant, the judgment shall be respondent ouster." The issue tendered by defendant's motion and affidavit in the present case is not included in the conditions mentioned in said section 45. (See Pollock v. Kinman, 176 Ill. App. 361, 364.) And, under the provisions of Rule 12 of the Municipal Court, above set out, we think that defendant's motion in the present suit to "dismiss and abate the action,"

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the jurisdiction of the court is general." as the court and law rule followed in namerous devisions in this fate, where an topue of fact is and upon a ples im "batement and the Lectu is To describe the st described and down les and seed to be been plaintiff, are not one of respondent surface (army v. illimate Central Fre. Sq., 48 1.1. 383, 168; Preer w. Young, 127 to, 194. Lude on the transfer was the state of the second of the configuration of the are broad of all agerouseer compact throughly on a sound four mage to him a volumble right be here the is the made and and tried. . skyriliti, as beit will be out at me gut of trabatall and firmed of as was sone, give bis a constant advantage, for if he falls, his metion would so simply overcuties, and he wald chill here a cigin to s irial an ins m rice. To parate a part to the aparatar at the note noted that it and it is to be a fine and the first note as and that we be an entire to be a considered the contract of th ికు ఈ ఓటి - కాన్ని కోన్స్ అంది ఈ కాండ్లు కూడు అనుకు చేస్తున్నని ఎక్కువేను ఇకుము \$5 . In the second of the seco er the few cas with the constitue of the constitue with the second of grade and in tellibert divisor, and to I mediated and added don ob that source aloratial of the english provided by aloration of the "if to the terms on any page in me a continue to the truck of a concernant in the set of in a life one, or . If it is a company of the entropies and visition and and other than a conjugate with the entropies of the confidence of the conf THE ROLL OF THE PARTY OF THE PA warmed of the a femant, and the court of some the court and the angle and the the judgment sault or recognized to the tot large territories by the section of a contract of the section of the sec in the orn thing months. An exist will are Established In all other while out of the contraction of the contracti while I will the the training of the contraction of the training and the sit when "emolo on . I an one washing of the little of all motors of motors

supported by an affidavit, was the equivalent of a sworn plea in abatement filed in a circuit court, and that the sanctioned rule above mentioned should here be applied. (Friend & Co. v. Goldsmith & Seidel Co., 307 Ill. 45, 48.)

Our conclusion is that the judgment appealed from should be affirmed, and it is so ordered.

AFFIREED.

Barnes, P. J., and Scanlan, J., concur.

expressed by an efficient, was the equivalent of a overn plant in abatement filted in a circula court, and that the constioned rule bove noutioned should here be applied. (Priorit 2 - 2 . v. Colomith & Selfel Sp., 307 111 - 45 , 43.)

Gut constant in the the fulgment approved than should be effirmed, and it is so asdored.

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Sarana, 1. J., and Consing, J., concer.

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JOHN GRIFFITHS & SON CO.,

Appellee,

FRED HANK and GUSTAV HARE, Appellants.

255 A.A. 618

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE SCARLAR DELIVERED THE OPINIOS OF THE COURT.

This is an appeal from a judgment for \$8,600 entered in the Circuit Court of Cook County, in favor of John Griffiths & Son Company, a corporation, plaintiff, and against Fred Harm and Gustav Hann, defendants. The case was tried before the court, with a jury.

The declaration consisted of the common counts. affidavit states that there was due the plaintiff from the defendants, after allowing the latter all their just credits, deductions and set-offs, the sum of \$10,607.36. The claim was for work and labor done, materials furnished, etc., in the making of certain alterations and additions to premises leased by the two defendants from the Moir Hotel Company, for the purpose of conducting a restaurent therein. The defendants filed a plea of the general issue and also a verified plea denying joint liability. The defendant Gustav Mann later filed an additional plea averring that on May 27, 1926, he was one of the organizers of a corporation then in process of being organized, etc., by the name of Mann's Catering Company: that the purpose of the corporation was to conduct a restaurant business under the name of the Rainbo Boston Cyster Monse, "in certain premises in a building called Morrison Motel;" that plaintiff was then advised of the aforesaid facts and then and there entered into an agreement in writing with the defendant Gustav an for the furnishing by plaintiff of certain labor and material

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Annellantto.

2551.A.618 AFFAL TROP CIRCUIT COURT OF BOOK COURTY.

M. JUNICE SMALLAL DELIVERAD THE OPINION OF THE COURT.

Buts to an appeal from a laborate for \$0.000 antered is the Circuit Cours of Cook County, in favor of John Griffiths & Son Company, a corneration, plaintiff, and against Fred Each and Gustay Marm. defendants. The case was tried before the court. with a fury.

The dealeration consisted of the common countries. affidayit states that thore was due the plaintiff from the defentsale, after allering the latier all their just credits, deductions and est-offs, the sun of \$10.507.35. The claim was for sore and labor done, materials furnished, etc., in the making of certain alterations and additions to premiser leased by the two defendance Trom the Moir Notel Company for the purpose of conducting a resteurent therein. The defoudable filed a place of the general issue and also a vertiles also denting joint liability. The defaudant Custer Mann later filled an conficient cless away ring that as East 27, 1926, he was also of the arganizars of a corporation then in process of helmy organized, etc., by the armed of hand's vetering Company; that the purroes of the egrapatice was it conflot a rate; mostagl oddian and to been the restreet business instruction House, "in certain premises in a building called Fortien Notel;" that claim to a see the end to be the state of the claim and the case there entered into an agreement in arising will the defendant Gustar Ham for the formal ability by plaintiff of certain later and material

and the making of certain alterations and additions to said premises; that the plaintiff was to furnish all the labor and material required to complete the entrance to said Oyeter House in said hotel, for which said defendant agreed to pay the actual cost plus ten per cent profit, and to make payments from time to time as the work progressed and to make final payment upon the completion of the work: that on May 27, 1926, said corporation was duly organized. etc., to conduct said restaurant, and thereupon entered into possession of said premises; that said defendant was a stockholder. director and officer in said corporation, all of which was then and there known to plaintiff; that on or about June 1, 1926, it was agreed between the plaintiff and said defendant and said Catering Company that in consideration of the promise and agreement of said Catering Company then and there made by it to the plaintiff that the Catering Company assumed and agreed to perform the obligations of said agreement which were to have been performed by said defendant. and the plaintiff agreed to release said defendant from the obligations of said contract, and agreed with said Catering Company to perform said work and deliver said materials to said Catering Company; that the plaintiff thereafter received and accepted various payments from said Catering Company on account of the contract price of work done and materials delivered and that thereby said defendant was released from the obligations of the said contract. An affidavit of merits verifying said ples was also filed.

The defendants contend that "there is no evidence in the record showing the joint liability of the defendants," and that therefore "the Court erred in denying defendants' motion for a directed verdict." We find no merit in this contention. It is based largely upon the assumption that the letter of the plaintiff, dated Eay 27, 1926, and addressed to the defendant Gus kann, "constituted a valid and binding agreement between the plaintiff

and the mailing of certain alteration on activities to rate or and Injusting in added in the special of sectivity after our sent to be Page is east, Tried of a constitute of the district and are seen as the page bolel, for which and follow at agraes to get to ket at prokylus two per comits, who to a payere to true to the term to the .. with the the ref the many many and many of the beasement from the Trail that an ery residence the party of the trail trail trail The latter that the transfer of the court of for real and also to the control or the all models that total Lacre Madwi to sint willing the constructed to the sense and the sense a will to fire think the formation of the thing of the entered to be the control for any plication that the description of the transfer of the state of the sta ිසුදු අද 19 ද දින්න වූ වෙන වූ වන වූ වූ දින් මේ ය. එන්නයට නාය (ලනයට දු මෙන්නම් **යුණ්ණ**ම් to many trailing on a filtery of form. The bear one office and guitable I BE THE STATE STATE THE TO LIVE DESCRIPTION OF STATE STATES AND ASSESSMENT TO STATE STATES AND ASSESSMENT OF THE STATES AND ASSESSM weighted but made the bottom to a construct brought Bits to to wit have lions of sail contragt, and appears it could unterly a temperature the of o', in a constant for its fine that but without party that the plaintiff their a secent of the party and that trees out and the street of the special of the second g get i tan i lon gong il sode i a timitata a Enlamba mach dasm lo river to ma . they the the action of a sold in the first first formation of the contract and the contract an of marits verificant again view are aler rises.

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and Gus Mann only," and that "this was the contract under which plaintiff proceeded to perform services and furnish materials." and that it is evident from this contract "that the plaintiff did not look to Fred Munn for payment, nor did Fred Mann, either expressly or impliedly, by that agreement agree to pay for any work or materials." After a careful consideration of all the facts and circumstances in this came we have reached the conclusion that the letter in question is not the only evidence that must be considered in determining whether Fred Mann was a party to the contract in question. Plaintiff's manager, Reuttinger, testified that this letter was not intended to constitute the agreement with regard to the work done and that he wrote it solely because Gustav Mann asket him to write the letter in order that he, Gustav. might have something to show his brother Fred as to the agreement. Moir Hotel (Morrison Hotel) leased the premises in question to Fred Kann and Gustav Mann. By the terms of the lease they were authorized to make alterations in the premises. A written agreement, supplemental to this lease, dated Hay 12, 1926, authorized them to enter a pertion of the premises on May 25, 1926, for the purpose of commending alterations, etc. At the time the defendants executed this sunplemental agreement they discussed with Mr. Campbell, the vice president of the Weir Hetel Company, the alterntions to be made. and they asked him who was the "right party" for them to hire to do the work, and he stated that the plaintiff had built the Lorrison hotel and was the "one concern in town that has facilities to go shead with the work and do it quick," and at the suggestion of Gustav Mann, Mr. Campbell, in the hearing of both defendants, telephoned the plaintiff in reference to the work. The defendants were anxious that the work should be completed at the earliest possible moment in order that the restaurant might be open for the Mucharistic Congress that was to convene in Chicago on June 15.

anunt all a specific pris the "int" tell fur mand and has minipril's proceded to the services and continuous tilentein, has trained an one of the store of the same of the same of the same of east foot to a read the row from the state of the terms pressig or tentioner, by to a special control of the control The state of the s greeter to this come we have seen a culture in accordance to Began I was of I am take a modified give the size of this in the govern the contraction of the entry of the property of the contraction of the ar to the control of the war in the time are the street of the st -smor avail are a price . Then the to I had not not not not the I no that . The street is a second of the street and the street an Participation of the property all besite by regard and every off or a total of the constitution make alter alloge in the continuous continuous and actions the talks leaves, arthur tour 1 of 1970, such that the line of the term of talks MALESTON A TELEPOOL OF THE STATE OF THE CONTROL OF THE STATE OF THE MALESTAN AND THE CONTROL OF - Angle - 全日本 10 (1911) 12 (1911) 2 (1911) 13 (1911) 13 (1911) 13 (1911) 13 (1911) 13 (1911) 13 (1911) 13 (19 一般,1911年,1911年1日 1911年 , it is the complete the first of the color of the first sentences gar en la caración de la companya del companya de la companya del companya de la force of the death of the second to the second the . The same and as a same and interest now the second of th the modern and the control of the first of the odd Arim hands as ുള്ള പ്രധാന വിവരം വിവര്യ വിവര്യ വിവര് വ inglit. I have a followed and and another star नतार पर पान्त । विकास के देवार पान्य पार्ट के प्राप्त की किए की की किए की "I tall to a comparate the seek of the last meaning the community of the seek of the community of the commun

Fred Humn admitted that at this meeting the matter of the alterations and changes that were to be made was discussed for over an hour and that he took part in the discussion and approved of the plans as suggested by his brother Gustav. Fred Mann further a4mitted that at this meeting Mr. Campbell "assured us that Mr. Griffiths would do it." It will be noted that the two defendants were then in possession of the premises upon which the work was to be done by authority of the supplemental agreement signed that day. May 12. The plaintiff commenced work on the premises May 25, 1926, two days before the letter upon which the defendants rely. was written. Reuttinger testified that he had met the defendant Fred Mann at a number of places prior to May 25, 1926; that he had been in the same parties with him at ball games and other occasions; that he knew his voice; that about the middle of May, 1926, in a telephone conversation, Fred Eann stated to him that he (Fred Eann) and his brother Gustav were then in their attorney's office closing up a lease for the Beston Cyster House at the Morrison hotel and "that our (plaintiff's) name was suggested to him as being able to make alterations that were necessary to put the job in the kind of shape that he wanted it in. In other words, he was going to make it a different kind of place and he wanted to know how he could do it. I told him that it was a job that was very complicated and after the plans were ready we would be out in his place within ten days. He said: 'This sounds all right, it is satisfactory to me but I will send my brother Gus over to see you and you and he can go completely over the details; " that two or three days afterwards the defendant Sustay Hann come to the plaintiff's office and stated to him that he was there at the request of his brother Fred: that at this meeting the matter of the alterations was discussed; that Gustay said that the plaintiff was to send its bills to the architects for approval, and that whatever amount they approved "he and his brother Fred would pay." The defendant Fred Hann had been a

-wratte end to retten and indices that as and hattists much bort he toy, to't beneath ear size of ores fail regard ton enelt end to beverya has motesuse it will all trang door on that has reed pleas an suggested by his bee, not inches. Fied I man interes and alited that at this section . T. Caspani to tent battim Orifiths weald do it. " It will be noted that the estate its were than in personates of the gravises a en its in work as is talle beautic landoneum i interestente entre le l'illiante et auch es day, May 10. The plaintiff crameracd with on the precisess tay 10. INDER . Two days halfeld the invites when which in interest out of aget out . Bills. was written. Sauttinger testified that he had set ten errection Bod as that (300) to ment of process pries to may 15, 1800; that he had innotagons taken has some that is nit take anisted was all at anot that he know his wilet; that thought the profit of the place is a the state opened and the state of the state कुर्दे प्रवृत् अकर्रीक वर्ष्यालयात्रक प्रवृत्ति कर्रा प्रवृत्ति होते हैं कि the frier grains, and an above season material and are seed a an that sur (clutariff's, acae one such seed to one o tolar of with the thing is the collection of the city of the collection of the collection of the city of the ci on their or see your or the time of the bank grants to bath they the att it. Feel this that if the a jet that and viry on his conf. and the contraction of the contr days. He anid: "This spends mis is is i velicing of the gradient to the transfer of the second of th the completely area the detailer: " : 1145 to are gisteller for the risk to the rest of a first than the form of t de light of the tention of the least to deal to their less the land will be de a cho unity and amplifuration of the pattern of applicate while -tipes off the life of the out one Thruster and dust him endend the said the appropriate the bottom of the said the said the said s or of the creat but is inchise a sell ". The biscor less teriford sid resident of Chicago for many years and was apparently a substantial business man. The defendant dustay Mann had but recently come to Chicago, and there is much force in the argument of the plaintiff that it is unreasonable to assume, under all the circumstances in this case, that it would make its contract with Gustay Mann alone. We are satisfied that there is ample evidence to support the finding of joint liability. The defendants contend that the testimony of Reuttinger as to his acquaintance with Fred Mann and his ability to know his voice over the telephone was impeached by statements of the witness made at a former trial of the case. Assuming, for the purposes of the argument, that this last contention of the defendants is justified by the record, such impeachment would merely go to the credibility of the witness and the weight that should be attached to his evidence.

The defendants next contend that "the Court erred in not granting defendants' motion to strike all thatimony of conversations and negotiations prior to the written contract." This contention is based upon the assumption that the letter of May 27, 1926, constituted the contract under which the plaintiff performed services and furnished materials, etc. We have heretofore disposed of this assumption of the defendants, and adversely to them.

The defendants next contend that "the verdict of the jury is against the overwhelming weight of the evidence and should have been vacated." There is no merit in this contention.

The defendants next contend that "it was error for the Court to admit in evidence the lease between the defendants and the Meir Hetel Company." We cannot agree with the defendants that this lease must be regarded as a transaction wholly unrelated to the subject matter of this suit. In our judgment the lease, together with the written agreement, supplemental to it, dated key 12, 1926, was a circumstance directly bearing on the important question as to the

resident of Chicago for sany years and sen apparently a substantial business man. The isfendant duster dann had but recently cont to fairage, and there is much force in the argument of the shintlist that it is unreasonable to assume, under all the circumstances in that it is unreasonable to assume, under all the circumstances in this mass, that it would make its contract with dustry hade alone. We are satisfied that there is apply evidence to support the finding of fairtinger on to his accuminance with fred that the instance of Easttinger on to his accuminance was incombed by standard the shiring the purposes of the argument, that this is at consenting of the standard that is about a supposes of the argument, that this is descending of the standard that is about a should service to the credibility of the ulteres and impressed to the credit be standard to his criscale.

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The neighbors the same of the "it is an and the same of the "it is a same of the Same to admit the same to a same of the same same of the same same. The care of the same same of the same same of the same of the

liability of Fred Mann. Moreover, the defendants offered the lease in evidence and they cannot now be heard to complain of its admission when offered by the plaintiff. (See Bogart v. Brazec. 331 Ill. 160, 181.) The defendants admit that they offered the lease in evidence, but they state that at the time they made the effer they informed the court that they introduced the lease for the purpose of showing "the assignment to the Mann Catering Company," and they apparently argue that this saves them from the effect of the rule stated in Bogart v. Brazec. We find no merit in this position. The lease was referred to by the parties in their talks about the proposed work and alterations, and it gave possession of the premises in question to two persons, Fred and Gus Mann, and, further, the written agreement of May 12, supplementary to the lease, showed plainly for whose benefit the proposed alterations were to be made.

The defendants next contend that the court erred "in admitting in evidence statements of account not shown by the evidence to have been received by defendants." It is admitted that the statements in question were received by the architects in charge of the alterations, and Reuttinger testified that Gus Mann told him that if the plaintiff did the work it was to take instructions from the architects and to send the bills to the architects for approval, and that he and his brother Fred would pay the bills that were so approved. We find no merit in the present contention.

The defendant next contends that "the verdict of the jury is inconsistent and illegical and was arrived at by compromise." In support of this contention the defendants state that it was stipulated between counsel for both parties that the balance due plaintiff was \$10,607.36, and that the verdict of the jury should have been either that the defendants were not liable, or, if liable, that plaintiff's damages were \$10,607.38. In Jones v. Eates, 179 Ill. App. 578, 584, the court states:

liability of Fred Same. Foreover, the desentate affered the lease in evidence and they cannot now be heard to complete of its admission when offered by the pisintiff. (See Houset Y. Masses. 231 lil. 150, 181.) The desendants admit that they offered the land in evidence, but they exate that the lime they ende the offer they informed the court that they introduced the lease for the purpose of chewing "the eastignment to the house them from the pany," and they apparently argue that this saves them from the cast: no the house the first this position. The lease was referred to by the parties in their talks position. The lease was referred to by the parties in their talks about the proposed were and alterations, and it gave possession of the greates in question to two persons, brac and due ham, and, farther, the written agreement of may 12, supplementary to the lease, abased plainly for vhose beautit the pro-

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In support of this contending the defendant state that it sas stipualed between connect for both parties that the balance and plaintiff was \$10,607.35, and that the vertice of the jury angula have been either that the defendants were het limbs, or, if ilebso, that plaintiff's demages were \$10,607.35. In Jenus 1. 1986. 179

"This contention cannot prevail under the well established rule of law that the defendant cannot be heard to object because the amount allowed plaintiff was less than the evidence showed was due him. The plaintiff alone in such case is entitled to complain of the smallness of the verdict. Reyman v. Reyman. 210 Ill. 524; Reid v. Houston, 20 Ill. App. 48; Starks v. Schlensky, 128 Ill. App. 1."

The defendants contend that the court erred in giving several instructions to the jury at the instance of the plaintiff. We have carefully examined said instructions and we find no merit in the instant contention.

The defendants contend that the court erred in refusing to give the following instruction offered by the defendants:

"The Court instructs the jury that if you believe from the evidence that the defendant, Gustav Mann, entered into a contract with the plaintiff, John Griffiths & Son Co., for work and labor to be performed and materials to be furnished by the plaintiff, and that thereafter the Mann's Catering Co., a corporation, with the knowledge and assent of the said defendant, Gustav Hann, assumed and agreed to perform the obligations of said agreement which were to be performed by the said Gustav Mann, and that the said Eann's Catering Co. further agreed to pay for said work, labor and materials in accordance with the said agreement, and if you further believe from the evidence that the plaintiff, either expressly or impliedly, released and discharged the said Gustav Kann from the obligations of said agreement to be performed by the said Gustav Nann, and accepted the Mann's Catering Co. in the place and stead of the said Gustav Mann, and that thereafter the plaintiff did perform said work for and deliver said materials to the said Mann's Catering Co., and that plaintiff hereafter received and accepted various payments on account of the contract on the same from the said Mann's Catering Co., then you are instructed as a matter to law to find the issues for the defendants. "

The defendants argue that this instruction is based upon the theory "that the contract was between Gustav Hann and plaintiff and that there was thereafter a nevation agreement whereby Gustav Hann was released and that thereafter plaintiff performed the work for the corporation and accepted payments from the corporation on account thereof," and that it was highly essential to the defendants that this instruction should have been given. The instruction is subject to a number of just criticisms. We find no evidence in the record to warrant a theory of fact that the plaintiff "released and discharged" Gustav Hann (or Fred Hann) from the obligations of the

"This dostention cannot provail under the sail satablished rele of law that the defendent cannot be heard to object because the smount allowed plaintist was less than the "vidence whowed was due him. The plaintist sione is such eras is entitled to dempiain of the smallness of the vertict. Across v. January 110 111. 524; Keld v. Houston, 20 111. top. 42; vinitary.

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The defendants argue that this instruction is beast top of the theory that the contract was between Sustandard and thereafter a nevation agreement shareby vuctor Feat was released and that thereafter aluminity performent. A foreign for the expension and accepted payments from the corruption and accepted payments from the corruption of that it was highly excential to the defendants that this instruction should have been trem. The instruction is subject to a number of just entitionare. We have no evidence in the jest to a number of just entitionare. We have no evidence in the descript to warrant a theory of feat that he middless that all should be readed and discharged for warrant a theory of feat that he middless the oblightful statement of discharged for the contract of the feat and have been that he middless that of the oblightful of the

agreement. Moreover, the jury were not given, in the instant instruction or any other instruction, a definition of explanation of the term "released and discharged." It is a sufficient answer to the defendants' contention that the instruction was based upon the theory that there was a novation of the original contract, to say that nowhere in this or any other instruction were the jury informed as to what would constitute a novation. The plaintiff contends that it entered into a contract with Gustay Mann and Fred The defendants contend that the plaintiff entered into a contract with Gustav Mann, along. The instruction is not drawn upon the theory that the defendant Gustav Mann, alone, entered into a contract with the plaintiff, etc., and it ignores entirely the alleged responsibility of the defendant Fred Mann. If the jury should find from the evidence that he was a party to the contract, the instruction would only tend to mislead them. In our judgment, the instruction was very apt to confuse and mislead a fury of laymen.

The defendants contend that the court erred in refusing to give an instruction effered by them to the effect "that the plaintiff, in order to recover, must prove by a prependerance of the evidence that both Fred Eann and Gustav Mann ordered the work." It is is quite plain that under the facts and circumstances of this case the court was justified in refusing to give this instruction.

We are satisfied, from a careful examination of the entire record, that the work dod labor done, materials furnished, etc., by the plaintiff under the contract, were for the benefit of both defendants. The defense in the case was of a shifty, evasive and technical character.

The judgment of the Circuit Court of Cook County should be and it is affirmed.

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agreement. Moreover, the jury were not given, in the instant instruction or any other instruction, a definition or explanation rampsa traintitur a at il ". hogrados th has becomer and te to the defendants' contention that the instruction was been even the theory that there was a newation of the original contract, is say that nowhere to this or any ether instruction were the jury informed as to what would constitute a nevation. The plaintiff boy'l has mand valued till tourings a olai heroine il lette ahneines a cial begins Thisalele add bad basines administed adT contract with Suctav Mann, along. The instruction is not drawn upon the theory that the defendant Gustav Mase, plong, entered into a contract with the plaintiff, etc., and it imprese entirely the alleged responsibility of the defendant Fred Rann. If the jury should find from the evidence that he was a carty to the contract, the instraction would only tend to times. In corjudgment, the instruction ran vary apt to profile and midlend a jury of laymen.

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The judgment of the Circuit Court of Scar ounty should be and it is affirmed.

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Barnes, F. J., and Oridley, J., concur.

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CHARLES A. DAWELL, Appellant

UNION TRUST COMPANY, a corporation, Appellee. APPEAL FROM CIRCUIT COURT,

MR. JUSTICE SCANLAR DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles A. Dawell, brought an action in trespass on the case against Union Trust Company, a corporation, defendant, to recover damages for alleged negligence of defendant in failing to perform its duties as trustee and in negligently authenticating certain bonds of the Chicago Fuel Company, Inc., which were secured by a trust deed that conveyed certain lands, coal leases and coal contracts to defendant as trustee. The original declaration consisted of one count. Later, plaintiff filed two additional counts, designated as "First Additional Count" and "Second Additional Count." Defendant filed general and special demurrers to the declaration and each of the counts, and the trial court sustained the same to the declaration and each count thereof, and plaintiff electing to stand by the declaration, judgment for costs was entered against him. He has appealed.

The declaration is very lengthy, the first additional count taking up 111 pages of the abstract. The first count charged that Chicago Fuel Company, Inc., an Illinois corporation, executed a certain mortgage or deed of trust that conveyed to defendant, as trustee, real and personal property, rights, con-

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CENTRAL A. DURING.

UNION TRUCK COMPARY. a corporation. appointed

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Finishiff, Charles A. Francis, Drought as acceptant in trespond the fire rate of the Carles and acceptants. A composition defendant in the fire all and acceptants of the carles and in tresity and falling to perform its dubter of the carry that angligentity which were negative in the carry that any acceptant of the carry that any acceptant of the contract of the carry that any acceptance of the contract of the carry that acceptant decimal occurs of the carry that acceptant decimal occurs, and the carry that acceptant occurs, and the carry that acceptant occurs, decimal occurs, decimal occurs, decimal occurs, decimal occurs, and the carry acceptant occurs, and special count that carry and grant of the carry that count there are such occurs, and grant the carry and grant that the carry the count there is and grant that the carry the count there is and grant that the carry the count there is and grant that the carry that the count there is and grant that the carry that the count there is and grant that the carry that the count there is and grant the carry that the count there is and grant that the count there is and grant that the count the count there is and grant the count that the count that the count that the count the count that the count the count that the co

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tracts, privileges, franchises and other things of value, as security for its bonds to be issued under said mortgage, and that it delivered said instrument to defendant and the latter accepted it in writing "and the undertakings, conveyances, covenants and obligations thereby became established in the defendant as grantee and Trustee for and on behalf of all the persons who should then or thereafter purchase any of the bonds" of the said Fuel Company, issued under and in compliance with the terms of said mortgage, which required that said bonds, before they became valid, should be authenticated and certified by defendant; that defendant entered into and upon its duties as such trustee and thereafter issued and delivered to purchasers the permanent bonds of said Fuel Company issued under said mortgage deed; "that thereby and by means of said instrument and its acceptance by the defendant and by necessary implication\* defendant held out to purchasers of bonds issued by it under said mortgage that said Fuel Company had obtained a substantial amount of property of the kind and amount therein described, and of sufficient value to be reasonable security for each and all of the said bonds, and that defendant by necessary implication indicated to the said purchasers that said Fuel Company had exercised reasonable care and diligence to obtain such security, and that it had exercised the same degree of care in obtaining reasonable and reliable security therefor, which to a prudent mind would appear to be necessary for the protection of his own interests, and that said Fuel Company had complied with the laws of the State of Illinois regulating the sale of securities in said state: "that thereby also by the meaning of said instrument," and by necessary implication, it became defendant's duty, before certifying any of the bonds, to ascertain whether or not any property existed, or what property had been conveyed to it by

tracts, privileges, franchises and every things of values as ford have engagero. "I - arthur but of about wit roll witnesses bounded to date and in dramming at immunical blan beterifor it the marking one of the contract of the second of the anistre at the - control of the control and the branchidades and one identified and the control of the control TO MALI TERROT - AND TO .... D. V. II . T. T. I' . Re but we i sofgatt bee . The real our services and the transfer of the real our of th is used antier and in compiliance with the fine of what wertheree this regulared that courts, reserve tray hereus valid, croske be additioning and cortified by difficients that columniate Automorphisms well-to best because the transmission of the confirmal states as molenta and social seasons. behalf transmiller of . To thee deep week add area morne of here mader cold northrow does that the tree or and he work of orthe coldination ment are like neceptamen by the caremant and by mecesoiry tapking to of er and the following permission of here is the best to be the to there it leave the a conferd bed proper law bins i de applican property of the side and should therein a sheet and - at the state and the contract of the fire of the contract o වුවු ලද දී වර අව අවදීවිතුව ය. විශාලවීම්ලෙන්ම ලුව සැල්බෙන්ම වුව මහ එක්කම් මේ එමක්වී මිනික the state officers. I do in the case transfer is also defined and analytical nave to the interest of the coll in , the college and the ot committee -er d. William to believe to allowe the set of minimized at these to be the set for , which to a cruder mand stable appears to be an active or the the care of the same terms are supported as the most consumer and it was not the comment of the party of the property of the property of the comment of the co to the the state of the contraction of the contraction to and a large remained by a control of the to motest a very a or it was an a two margifiers oration grand ency management outaked, s. o. it grand, by the se a committee of the

anid Fuel Company, whether there were any prior incumbrances on said property, whether said mortgage made to defendant was a first lien on the property conveyed to the defendant and whether or not there were vendors' or other liens on said property, and to see that the lettering required by the laws of said state to be placed upon bonds secured by lessehold properties or second mortgages was properly placed upon said bonds at the time of such certification and issue: that at the time in question it was the custom and practice of all persons end corporations engaged in the business of accepting and performing trusts of the same general nature as the one in question, upon the acceptance thereof, to make sure that there had been obtained under such mortgage a sufficient amount of uningumbered property of the kind therein described and of sufficient value, in the judgment of such trustee, to be reasonable security for the bonds to be certified and issued, and that if any prior loans were outstanding against said property that sufficient funds to satisfy such items were applied to such purpose, to see that the evidence of such liens was satisfied and delivered up and cancelled before the bonds described by said mortgage were issued and certified by defendant, so as to make said mortgage a first lien on said property at the time of the delivery of any bonds secured by said trust deed or mortgage, to see that the bonds were secured by the amount of property and security as designated upon the face of the bonds, or secured by said mortgage, to withhold such bonds from issue until the security thereof was known to be actually in evidence and available for the purpose of such mortgage, and to use due care for the protection of the purchasers of such bonds; that it was the duty of the defendant "upon accepting said trust" to see that the proceeds of the sale of the bonds were deposited in safe and sound banking institutions for the purpose of metiring outstanding obligations, but that the defend-

eald Fuel Company, whether there were my prior imposionages on serit e new inchester of whom applicate him todayly graver blue lion on the property conveyed to the defendance and whether or not there were vendere' or ether lians on anid proporty, and to see that the lettering required by the laws or soid state to be placed upon bonds socuted by Lenselel. projection or second mortgages una repetly placed upon sold bend at ... the bire of that dealification bus motion and two il makes of as only as tell target bus practice of the persons and ecryptersions empayed in the burdings of accepting and perforaing trusks of the case general nature as the and in treetion, apan our acoeptence abservel, to units sure that there had been obtained under ruch merigage o sufficient renumb of smodelilus le bes bette de directe said ell te greege derectmentum value, in the judgment of ouch bringer, to so recensing menusity for the bone to be cortified and increal the off any prior learn or chief additi age and property bles tables by the base of the salisfy and alema care appli o to parpoor, to see that the coi-Lefferno Los on Divite. has beilelt a are anoli done to come before the quate describe, by and me trade one issued and contilled groupers bine no noil for it a rippi and bine cien of the oction the contracted ye re book found fire get horsome abund guin to troubled will to unit unit to THE PROPERTY AND REST THE DESIGN OF CONTROL OF STATE OF STATE OF THE PROPERTY and negarity as doub maked Good the feet of the beart, or proger by attrios: et litai or et mat. Crand den et mat. thereof was known to be nathraly in sicense of ever hold for the - O MELLO CONTROL OF A THE WAR OF THE STREET OF THE STREET OF THE STREET OF THE STREET in the season of another and the season and areas and areas of the "Moda acception and truet" he sen that the product of and make of nan analisedelle pecker i baker Pur Mir. Lie voskedoh i man aband add the purpose o. otherny outer ading voting along , but the a three tent

ant negligently permitted "Morris, Castings & Green, Inc.," to be designated as the bankers for said Fuel Company and to handle funds to be derived from the sale of bonds, well knowing that said corporation was a fake concern and without financial backing; that the defendant thereafter, with full knowledge of the bankrupt condition of said Fuel Company and that it had not complied with the Securities Law of the State of Illinois, with full knowledge that many of the properties described in the trust deed were not held in fee, but were only leases, and with full knowledge that there were vendors' liens outstanding against parts of said property, negligently, and with intent to deceive the public and plaintiff herein, certified bonds, which bonds were designated as "First and Refunding Bonds." as follows: "This is to certify that this is one of the bonds described in the trust deed within referred to," and thereby lent its credit and prestige as an institution created by the State, to said bonds; that defendant, in disregard of its duties, certified and issued large amounts of said bonds, which were put upon the market, when it had knowledge that said Fuel Company was bankrupt and when it knew that there were outstanding bonds in the sum of \$270.000 of said Fuel Company, secured by a prior trust deed on the said property, in which defendant was trustee, and that defendant. with the said information and knowledge, negligently certified and caused to be issued Series "A" bonds of said Rucl Company; that on January 10, 1924, plaintiff, relying upon the direct and implied representations of defendant and its credibility and standing, and the presumption it had used reasonable care to protect the interests of persons purchasing said bonds, and believing said bonds to be well secured and that defendant had used reasonable care to see that said mortgage deed was a first lien upon the property described therein. and that the defendant would not certify bonds of a concern that was

ent mostingently parmitted "Morris, Cantings & Green, Inc.," to be shout oftend of the yangued four blue to a anched off un bedenplech - and him take the only of bonds, well having the end of persisten was a fake convers and without financial backing that the defendent thereafter, with full has help of the bankrupt comdition of soid that Company and that it had not complice sich the Securities have find 'cate villimeter, with full imeriage of mony of the properties described at the truck dood over mere and to Tee, but were only lacess, and with full knowledge that thore were remders' lione substanting against parts of and property mealigent--itro actor interior to decoive the public and plaint interior about saline ted to the sail of the sail of the said the said the said the sail "This is to certify thet this is one of the beads do-Involler ma seribed in the truck deed within reformed to." and thereon lant is eredit and prostige as an institution ereated by the otate, to make han belilitate gradul and le brogerath of Jackstob Sail telact issued large essents of nois bunds, which care per apox in market, but during one engaged for blue full orbeived bed of made To mus the mission palterington trov creat and want it made \$270,000 of and Fuel Company, and betted by a prior true fork on the said property, in which serenders a scholes, and rest defendant with the said information and anti-was, negliganily services and no dedictions. Lower play to a wood "a" noiver beweek of at become Selien him though whe work percent the ridentale about the grounds man a relative to the elikitation and the ambiguity of the antiadaption is the sociation of the advancement bear book it notification and tion of all some blue and believeled bus about blue malesdoury average to bis that the at whee viderowest boat the francis bed been between martense desc and a first lies upon the property enorther Storein. any first greened is to bimpo whiteo for bluew imparted out find has

in a bankrupt and failing condition, and that no bonds had been or would be certified, issued and delivered until any outstanding bonds of said Fuel Company that were prior liens on said property had been paid and cancelled and until any and all vendors' liens had been satisfied that were prior liens upon the property designated in the mortgage deed, exchanged first mortgage bonds of the value of \$10,000 for six Series "A" First and Refunding bonds of said Chicago Fuel Company, secured by said deed of trust, of the face value of \$10.000; that said bonds bore the certificate of defendant. and that it knew at the time plaintiff purchased the same that they were worthless and that said Fuel Company was insolvent; that all of the assets of said Fuel Company have been sold by order of the Federal Court to satisfy receiver's certificates and prior claims that were liens against the property of said Fuel Company before and at the time said bonds were certified and issued by the defendant; "wherefore, plaintiff alleges that the bonds purchased by him were and always have been worthless, and that the defendant well knew said bonds were not a first lien and were worthless," and that plaintiff had sustained damages "on account of the negligence, wilfulness, carelessness and deceitfulness of the defendant certifying and issuing said bends in the sum of \$15.000."

The first additional count sets out the trust deed in full, which contains a copy of the bonds to be issued and the various contracts, deeds and leases conveyed to secure the same, and the count charges violations of the Illinois Securities Act in that the bonds were Class "D" securities under the Illinois Securities Law but that defendant did not qualify them under the provisions of that law, and that it aided said Fuel Company in the marketing and sale of said bonds and delivered them to the respective purchasers thereof, and that it "negligently, carelessly and deceitfully performed its

in a bankrupt and fulling equition, and that no bunds had been or would be corritted, isosoci and bullyered washing our thather bonds of said Yual Company that were pulsy lieux on said property had been paid and cancelled and mili any and all venter' lives had been entiefied that were prior lies upon the property designated ta the mortgage dood, enchanged first mortgage vande of the rike bler to aband gut mutual one forth "a" setted ate not 900.012 to Calengo Fast Commency secounced by ante deed of truck, of the face value of \$10,000 to be to be to be the bard bard the callitation of the barbards weds and were ods bresisting thiselade ents eas an mone it seed been were surthions and time and one longenty was involvent; that will and to rebre to also read they have been as as as as the gminio talig han mairaliliga a attour of the said for all two a lareles thet were lieus equines the graphy of the soid ward seaming before the bar the bar yet were vertilized out that the bar the series and tabe all to the carrie and all cause and a carrie of the contract and the carries and always have been vertaless, and thet its defendant a firm onte bende were due a tiret lien and were rechileser" and that richetalf had everained demograp on account of the negligence, willulance. takingal lan gniviletuu inchaal basi la gnosistilaasa kan saan salatsa ". Ooc, "Li to one est at shaed bles

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duties as Trustee under said Trust Deed, and unlawfully aided and abetted the said Chicago Fuel Company, Inc., a corporation, in various ways in and about the preparation, making, execution, issuance and marketing of the said bonds and the sforesaid trust deed securing the same:" that defendant was not a naked tructee merely holding title to the property, but that it was an active trustee charged with various duties by and under the terms and provisions of said trust deed, and which it was the duty of defendant to perform with the highest degree of care as the trustee under the terms of said trust deed; that defendant accepted the trusts and duties imposed upon it by the terms of said trust deed and by law, as trustee under said trust deed. Here follow a number of allegations as to the duty of defendant "as Trustee under said frust Deed" and the further allegation that defendant did not regard its Guties as trustee under said trust deed and that it was negligent in permitting said trust deed to be issued and recorded without having a legend with red letters not less than one-half inch in height across the face and text thereof stating that said trust deed or mortgage was a junior trust deed or mortgage, and a trust deed or mortgage upon leaseholds; that defendant permitted the said bonds to be issued by said Fuel Company and to be certified by defendant without said bends having a legend in red letters not less than one-half inch in height across the face or text of said bonds stating that said bonds were secured by a junior mertgage and by a mortgage on leaseholds, and permitted and sided and assisted in the marketing and sole of the bonds in violation of the Illinois Securities Law: that a dendant permitted the bonds to be issued and sold to various purchasers, including plaintiff, when defendant knew that the security for said bonds was inadequate and that the said Fuel Company was insolvent. and was issuing and marketing the bonds in violation of law, and that

dution on Trackes state rate Track land while willy alded and about the cald Internet Task Company, into . . . . . . . . . . . . . . . . realistance reals a restaurage of those been at wear orginar Invit ofmorethe and one about blue out to multified but appearant budritz barlon - for our lands Teb finis "throng with naive bash merely heldship eleka the top and before the place of win and more than were water any amount were an northly brangars, nere probability neglecting providence of each true does, and which it has the duty of dofterness - paid unhan andamas and ou cran to everyou brookles and both mantena of but to the first dead the terrent in the terre at the street and the terre dutten imposed upon it by the berme or into arone over and by list, as briston which bring fact a date fallon a mander of allegations men "house" same duke to man so dere " ne" da dirette to take sat sa sa the farther client than the discussion to discussions and translated its and in the court transfer with the true bear and and the court in the court of the Seed I a father produce population because he be per posses by well undered the true the constituent that the history and the areas also and come to the real place of the control of the co a junior truck tour or morether, and a truck dead or markenes and leastheldes tides defeat at grandition of the soil appropriate the defeater and Page Jongony and to we creatition by the characterist to the Confe edicted at final thereasy and out for arother has at because a parent with the tente of the or amenda the said and the said and the said 我们, 人名英国内尔 的人名 EDD "我把我是我们的 化 智醇 化压缩 化氯化甲基化银 性血病促进者 唯 實質 的复数阿斯特 And the all and part than the ar analysis of the but in both but and bunda in violation of the Clinal - on Cara in the contractor red . 2250 de les les les les la laboration de la company REGIO TO A PULLAR TO THE WAY HOW HOW ARE TOO WASH TELEFOR AND A TELEFOR REAL MARCHES - Substitute and access Last also and sect are constituted as almost the speed and to make leave all adole and paid whose the national new book the proceeds of the sale of said bonds were not applied to the payment and retirement of said prior bonds and obligations.

The second additional count does not set up the bonds or trust deed nor attempt to incorporate them by reference, but makes much the same allegations as the first additional count, and rescinds the sale and tenders the bonds to the defendant, and alleges that the plaintiff has sustained damages in the sum of \$15,000.

Plaintiff contends that the trial court erred in sustaining the general and special demurrers to the declaration and each count thereof.

The authenticating certificate on the bonds is as follows: "This is to certify that this is one of the bonds described in the trust deed within referred to." This certificate on the bonds merely identifies the bonds as those of the Chicago Fuel Company, Inc., to secure which the trust deed was executed, and it does not guarantee the validity of the bonds nor the nature, quality or extent of the security. (See Knickerbocker v. Ft. Dearborn Trust & Savings Bank, 219 Ill. App. 409, 418, and cases cited therein; Bell v. Title Trust & Guarantee Co., 292 Pa. 228, 233; Byers v. Union Trust Co., 175 Pa. 318.) A trustee of an express trust derives his power from the instrument creating that trust and that document furnishes the measure of his obligations. (Pomeroy's Eq. Jur. (3d Ed.) Sec. 1062; 39 Cyc. 290-4; Ainsa v. Mercantile Trust Co., 174 Cal. 504, 510; Enickerbooker v. Pt. Dearborn Trust & Savings Bank, supra, 417.) Neither the original declaration nor the second additional count sets up the trust or bond. Each of these counts alleges the execution of the trust deed, the acceptance by defendant of the trust, the alleged obligations of the defendant thereby established "as grantee and trustee" and its negligent failure to perform same. What is said in Knickerbocker v. Ft. Dearborn Trust & Savings Bank, suprathe present and retirement of each present acre met application.

The second additional count does not seek up to and seek up to out the out two or trunch the count of the count of the count, but sales and the count the chart and the count of the chief the the plaintiff has suctained demand in the chart the plaintiff has suctained demands in the chart the plaintiff has suctained demanges in the case of the count of the

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The ambhedtionting certificate on the bonds is no follows: \*This is to topically that to can of the emission to the transmission trust does within referred to." This derbiffants on the bende service them tilted the beads - these or the Palace length the tree that estime which the state of the court of the c eds to such to tellamp couston out ton chief to teller ent securally. (See Maickerbecker v. St. combona Truet a article Mani-Als Illa top. 400, 416, and c ses sire: therein: Sell v. Tille Trust A THORESON OF A PR. 18. 234 Nord v. Coles Tras to., 275 and the second of the entropy of the continue and the second of the seco indirectly every the state of the control of the co messare of his collabilation ("company" a hig. dus. ( 30 mm.) "co. lunci 39 Cyc. 290-48 than we Marsagell & Avent Co., Lye val. 104, 500; K. Tis surger should apply to the bound of the rest of the contract of the con Then be the talke a too and and and and added took lastofte and added molification that true ar beart. He is the security at the security of the exactivities of the true down down, the norwhiten by . Com at it the true, the and the same of the agent the contract the contract of the same of the contract of the contrac and there are a series of the configuration of the foreign of the series of the first soid in inicherbooker v. Fo. Iserboxe . d. i . avings . or, curre. (p. 417), is applicable to these counts:

"Looking, therefore, to plaintiff's said smended statement of claim itself, it will be observed that, after stating the execution of a certain 'mortgage deed of trust' conveying to defendant, as trustee, certain property, etc., as security for certain bonds, and the acceptance by defendant of said trust, the pleader proceeds to state, not the obligations of defendant as they are set forth in the deed from which alone they must be ascertained, but merely the conclusion and inferences of the pleader as to what they are. The averment contained in paragraph 3 is that 'thereby " \* " by the meaning of said instrument and by necessary implication, the defendant promised, undertook and agreed, etc., and the averment contained in paragraph 4 is that thereby, also, \* \* \* by the meaning of said instrument and by necessary implication, it become defendant's duty,' etc. We do not think that the legal effect of the instrument can be determined from what the pleader thinks it means. And some of the subsequent averments are seemingly based on the false assumption that the pleader had previously set forth, in substance, the covenants, etc., and the legal effect of the deed. As to the 'general custom and practice,' which is pleaded in paragraph 5, manifestly this cannot prevail against the terms of the deed itself. (Gilbert & Go. v. McGinnis 114 Ill. 28.)"

Plaintiff, in his reply brief, meets the foregoing principles of law by asserting that the present action "is not based on the trust deed itself, but is laid in tort for breach of duty by the defendant through which the plaintiff suffered damagez" and that "all that it was necessary for the plaintiff to do in his declaration in this case was and is just what the plaintiff has done, namely, to allege the duty of the defendant and the breach of that duty and the damages resulting to the plaintiff from such breach," and in the oral argument counsel for plaintiff stated that plaintiff's case was predicated upon the alleged failure of defendant to fulfill implied duties imposed upon it by law. This contention of plaintiff is clearly an afterthought. The declaration is drafted upon the theory that when defendant accepted the trust it assumed the obligations imposed by the same and that the damages sustained by plaintiff resulted from the negligence of defendant in the performance of its said obligations. The implied duties alleged in the declaration, the pleader charges, arose from the terms of the trust deed. To illustrate: The declaration alleges that defend(p. 417), to applicable to those countes:

"Looking, Shorelace, to plantelite sele emerical state mand of which the it will be observed that what when the This swood is and to many the state of the state of the state of to calledant, on transon, carrings was apertury offer an invitig ior certain nemer, and she acceptence by defend mt of said to bunishing the plant proposers so sky be, ret in abligations of devendent on they are not forth the need from which alone -mit has as an Court with a large till a court was no carry words your world Jache of the contract of the apprehense thre arcement TIME OF THE THE consolned in care, crays & is lead "shreeby of unit instruction and by meters in teplication, the defends, promised, and river and three, etc., and the everant cor-bulised in percept ped in test thereby, also, \* \* the test amount it inclinations you are more to the in an in derical at a cary, aco. a un not obtain to a son many offect admini. Tablein and Jene con't buning reach as n a subsacrised wit lo richings or singur to insure constite and be and been ance if beest on the files assumption that the pleader had previously seed forth, in autotion, the cover note of the the Legal " TO LEGG OF THE COURT OF THE PROPERTY OF THE PROPERTY .. lievong sonn o mint viletilam, i first, tow mi betable at delife minister v en a tradiff, thouse an add to come and deninge ala sal. an.

Plaintiff, is his regin brist, sort the correlation of the plaint of the BORD BERTH THE THE COUNTY FOR CA BULLEY. INVITED AND JUNE BELLEVERS EN Trock! but in laid in teat for bee on and an in the work to the one of the last last of the confiner beautiful the state of all delign agents also at two types the also as the contract of the twee course and and in just what the sinking of the term, start at his east ment the pris house the a six to the ord and the the track and to resulting to the plantif from mod breach, .... to the oral or unent the transfer of the term of the contract of th and the state of the second state of the second The decimalist of the contract of the contract of the contract of the contract of and the common of the collection of the action of the collection o milegiod in the declire tions, when the name of these and the time the particular · busing the told arranged in the color of the color of the court of the color of t ent entered into and upon its duties as such trustee and thereafter issued and delivered to purchasers the permanent bonds of said Juel Company issued under said mortgage deed and "that thereby and by means of said instrument and its acceptance by the defendant and by necessary implication" defendant held out to purchasers of bonds, etc. The contention of plaintiff is further weakened by the fact that in the first additional count the trust deed, that furnishes the measure of the obligations of defendant, is pleaded in full, and its terms prove that the conclusions of the pleader as to alleged obligations of defendant are not warranted by the instrument. Under the theory of the declaration or the present theory of plaintiff, the question as to whether defendant was negligent in the performance of its duties would have to be determined from the terms of the trust deed. As to the allegations in the counts respecting general curtom and practice, these cannot prevail against the terms of the trust deed (See Knickerbocker v. Ft. Dearborn Trust & Savings Bank, supra, 417.)

The first additional count alleges that defendant, under the terms and provisions of the trust deed, was charged with various duties and that it negligently failed to perform the same, and that plaintiff sustained damages because he relied upon defendant to perform its duties as trustee under the trust deed. The following are the material clauses in the trust deed that bear upon the question before us:

<sup>&</sup>quot;(c) The Trustee, save for its gross negligence or wilful default, shall not be personally liable for any loss or damage.

<sup>&</sup>quot;(d) It shall be no part of the duty of the Trustee to file or second this Indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or as a conveyance or transfer of personal property, or to renew such mortgage, or to procure any further, other or additional instruments of further assurance, or to do any other act which may be necessary to be done for the continuance of the lien hereof,

THE CONTROL OF THE CONTROL PROPERTY OF HEALTH WAS A CONTROL OF THE Issued and Collegeth to purchasers the permission of seven to see Company insured and a self war care and applicant blee to be in the contract the co means of said instrument and the worey rees of the entert to the entroped to whose and that has been expended to a market by the first the control of the control The contention of playing the content workers to make and that in the first and trings where the bound near post for the past List to become of an early of an alleg old to execute od and the Certain properties the complete complete and the companies of the Trans . The market and the first and the first are the presentation for a marchen light . Principally to traces amonous and we made unclose and to ground and the general as to whother referred me applies in the the best are Supra med to marea mis upon announced of of orme binno relief of the dece. An to the allegables of a resident for the state of the call and the state of the call and hoy. Level cute in amind of the action decimal decimal decimal section of antistage base thesis, (now Literaphon we will easy as as as a market base, CHARLE WELL

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or for giving notice of the existence of such lien, or for extending or supplementing the same. The Trustee shall not be liable for the exercise of any discretion or power hereunder, or for mistakes or errors of judgment, nor etherwise in connection with this trust, except for its own wilful misconduct or gross negligence. The Trustee shall not be obliged to take notice of any default until receipt of written notice thereof, signed by the holders of at least one-fourth in amount of the bonds outstanding hereunder, nor to take any action in respect of any default unless requested to take such action by a writing signed by the holders of not less than one-fourth in amount of the bonds hereby secured and outstanding.

- "(f) The Trustee shall not be under any obligation or duty to perform any act hereunder, or to defend any suit in respect thereof, unless indemnified to its full satisfaction. " \* "
- "(g) The recital of facts herein and in said bonds contained shall be taken as statements by the Company (Chicago Fuel Company, Inc.), and shall not be construed as made by the Trustee.
- "(1) It shall be no part of the duty of the Trustee to procure any fire or other insurance on the mortgaged property, or to renew any policies which may be procured by it or the Company, nor shall it be under any obligation to pay any taxes, assessments or other levies on the mortgaged property, or to keep itself informed with respect to any such matters.
- "(k) The Trustee shall have no responsibility for the validity of this instrument, nor for the execution or acknowledgment thereof, nor of any bond secured hereby; nor for the nature, extent or amount of the security afforded hereby nor shall it be responsible for any breach by the Company (Chicago Fuel Company, Inc.) of any covenant in this Indenture contained."

The mere conclusions and inferences of the pleader as to certain alleged obligations of defendant cannot be used to change or modify the plain terms of the trust deed. The special purpose of this first additional count, however, is to charge that defendant, in the performance of its duties as trustee, under the trust deed, was guilty of a violation of the Illinois Securities Law, and in this connection plaintiff contends that "each count contains allegations of facts which show that the defendant was so closely and intimately connected with the issuance and sale of the securities here in question as to

or for extending or anylomenting the same. He Trustee chall for extending or anylomenting the same. He Trustee chall not be extended for the exercise of any discretion or precedent be highly for anyloment. The frustee otherwise in connection with this trust, except for the extending walful misconduct or grace registers. Inc Trustee whall not be obliged to the nestee of any default until receipt of aritical notion therefore, eigend by the holders of at level one-fourth in easier of the bonde outstanding forwander, nor to take each cotton in recept of any default wales and any criting older wales to request to face the such cotton by a vitting older beads border of the bolders of any default.

- "(I) The Tructed shall set be under any collection or design to perform any act hereunder, or to defend any ault in respect thereof, unless indomnified to its full satisfaction. \* \* \*
- \*(g) The recital of fucts herein and in said bands contained since the Company (Chiese of Tue), and shall not be construed as made by the Trustee.
- "(1) It shall be no pert of the duty of the Fractor to procure any fire or other incurence on the mortgaged procure any fire or other incurence on the mortgaged property, or to remove day polition which may be procured by it or the Coopen, whereast it be mader any eclipation to pay any texas, assermants or other archaecter and the mortgaged property, or to keep there informed with respect to any our masters.
- "(k) The Transes shall have no responsibility for the validaty of this instrument, nor for the execution or asimoviet the nature, others of my sees escurity nor for the nature, others or enound of the sentity afforded assety nor chall it be responsible for any breach by the Company (Juiose Such Company, Inc.) of any covernment in this laterature contract.

The more consignations and inferences of the planter to to contain alliaged definition of definition and tenne to used to used to obtain our factive the plain terms of the true of the true of the true and true the containstance of the dulies as true the few desires of the dulies as true the few to the containstance of the dulies as true the few the containstance of the desires of the desires of the desires of the contest o

make the defendant liable to the plaintiff under said Act." Under paragraph 3, sec. 5 of the Securities Act, Cahill's St. ch. 32. par. 258, subd. 3, a bank selling a security in any capacity in exempt from the provisions of the statute. (See Orr v. Croissant, 253 Ill. App. 396.) Plaintiff attempts to meet this rule of law by the further contention "that the defendant in this case while designated as 'trustee' was in fact, and as a matter of law, an 'agent' of the 'issuer,' as well as trustee under the trust deed." and plaintiff argues that there are sufficient allegations of fact in the declaration upon which to predicate a theory that the bank, acting as an agent of the Fuel Company, purticipated in the sale of the stock and that it stood in the shoes of the Fuel Company, when it acted in that capacity, and was subject to the provisions of the act. This contention also seems to be an afterthought. As we have heretofore stated, the declaration is drafted upon the theory that the defendant, by accepting the trust, thereby assumed certain alleged obligations and that its negligent Tailure to perform its duties. imposed by the trust deed, caused the damages to plaintiff. The allegation in the first additional count that defendant "permitted and aided and assisted in the marketing and sale of said bonds in violation of the Illinois Securities Law," cannot be strained into an allegation that defendant, in the capacity of an agent of the Fuel Company, sold bonds, especially in view of the special demurrers filed by defendant.

The defendant has argued at length and with considerable force that the declaration was bad for misjoinder of causes of action, for duplicity in each of its counts, and for insufficiency in the averments in each of the counts, but in the view that we have taken of the matter, we do not deem it necessary to pass

rebuil ". for him recour littatale ant of oldsil successes add cham portugraph 3, esse & of the Journalites the Chillin St. ab. 42. por . 255, subd . 3, a bask solitor a courity in any capacity is example from the provincions of the otheria. (See Orr v. Trainert. real to star stat from of esquesta theutely 283 111. App. 296. of the interest toposeting "back the deferent is this ever antle decigaated as 'tracted' was a face, and as a marter of law, ea ", boo. furt oif to me returt as line of 'trench' oil to 'tmam' and picinalifi argres thet there are cufficient allegables of . Mared and seeds wrongs a mared born of holds went mistory wiscob and wit soling as an exemp of the Tuel Comming rationased in the said of the stock and that it stock in the short of the Fuel Company, when th acted in that carredity, and or for the thir that all the fact act. This content also come to be an effectionable a so have herress ere etalege, the abearareton is braited upon the theory vint the defendant, by many this the arount, their emphasis the first alleged emligations and that he megligent lablare to perform its duples. and a light plug and management and the beauty of the plant and the beauty and the companies of the companie bettlered " samberlo: time tames tensional deril wit at molampelle and anded and cast alor in the territoring and sole of ends beneds in and the decimal descriptions, is a contract of the contract of the contract of annum of the season of the companies of filed by defendence.

The defendant has algories is isome with consider of consider of consider force that the decider of in rea bad for minjulation of consecutivities, and the insulation of the constant and the insulation of the constant for any the average of the constant was an in the stantant of the average of the average

upon these contentions.

In our judgment the court did not err in sustaining the general and special demurrers to the declaration and each count thereof, and the judgment of the Circuit Court of Gook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur-

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upon these centerations.

In our judgment the court old not err in cartelaining aft the general and special 'courters to the duct of the judgment of the direct, and the judgment of the direct our is affirmed.

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Barnas, F. J., and dridley, J., concur.

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TEHAMA JARICE PRITER,

Ys.

BERNARD W. SECW, Bailiff of the Eunicipal Court of Chicago, and S. RUGEEDORF, Defendants.

S. RUGENDORF,
Appellant.

of culcaso.

255 I.A. 619

MR. JUSTICE SCANLAN DELIVERED THE OPISION OF THE COURT.

court of Chicago, before the court, without a jury, the court found the right of property in the plaintiff, Tehama Janice
Writer, and entered a judgment that she have and recover from the defendants Bernard W. Snew, Estliff of the Municipal Court of Chicago, and S. Rugendorf, defendants, the possession of a Chrysler rendster, which property had been levied upon by the said bailiff by virtue of a writ of execution issued out of said court in a certain cause wherein S. Rugendorf was plaintiff and Steve Paveltick was defendant, and which property was then in the possession of said bailiff under said levy. The defendant Rugendorf has appealed from this judgment.

The plaintiff's evidence tended to prove that she purchased the car in question from Steve Barrett (who was also known as Steve Paveltick) on August 29, 1923; that she paid, at the time, \$100 in cash and agreed to pay \$425 that was then due on notes secured by a chattel mortgage on the car; that she obtained from Barrett, at the same time, a bill of sale for the car; that the car was delivered to her at that time and that it thereafter remained in her possession until it was seized by the bailiff; that since the delivery of the car she has paid the Bank of America six chattel mortgage notes for \$50 each, secured by said mortgage.

THE PARTY AND ADDRESS.

ECREARD W. CROW. Belliff of the Sumiered Court of Chicago, and S. RUCKHDOAF.

Defendants.

S. RUGERDORF.

255 LA. 619

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In a trial of reperty, in the administration of the administration of Chicago, before the court, without a jury, the court feund the right of ereperty in the plant if, lehums during friend of entered a judgment charped into the and recover from the defendants because to the filly of the hunicipal Chicago, and S. Suger, beiliff of the hunicipal Chrysler readstor, which property had been levied upon by the east beiliff of warful of a chrysler by virtue of a writ of exercitar leads out of east pourt in a certain cames shorein f. Sugerdorf was plaintiff and here the free entered to the court in a certain cames shorein f. Sugerdorf was plaintiff and here had been then in the defendant has entered for any the defendant has entered to the true for each was defendant and where coil levy. The defendant has endorf

The plaintiff's evilution that the prove that are the the one also known sinced the car in question that are there that the path, or the time, as Steve Paveltick) on August 30. Life; that she path, or the time, as Steve Paveltick on August 30. Life; that she path, or the time of action due on rethe secured by a chattel marryage on the sur; that the chief of the time of the car; the same time, at the care that that that and artists are the car; the results of and car the same time for the care to had the thirty of the car whe that the same of the car whe had the the halless; the car are same the delivery of the car whe had the the thirty of the car whe had the the the delivery of the car whe had the the the the car also be the the the corrular.

The appellant contends that "Steve Barrett was in possession of the Chrysler subsequent to the alleged bill of sale and had secured the license for the following year in his name. This conclusively establishes that he was the owner of the property in question." The trial court was justified in finding, under the facts of the case, that the plaintiff, and not Barrett, was in possession of the Chrysler subsequent to the alleged bill of sale. It appears that Berrett, in his own name, filed the application for the license for the car for the year 1929, that the plaintiff paid him the amount he expended for the license fee, and that she did not know that he used his own name in the application. The appellant concedes "that the issuance of license is only prima facie evidence and not conclusive and is subject to rebuttal." but he insists that under all the facts and circumstances of the case the prima facie case was not successfully rebutted by the plaintiff. The appellant has cited a number of personal injury cases in which the courts have held that where a plaintiff has shown that a license number on a vehicle at the time of the accident was issued to the defendant it made out a prima facte case of ownership of the vehicle in the defendant. In the present case, the evidence shows that the plaintiff, a working girl, did not know that Barrett had applied for the license in his own name, but, assuming that the appellant made out a prime facte case of ownership in Barrett by proof that he applied for the license in his own name, nevertheless we are satisfied that the evidence of the plaintiff entirely rebuts the presumption raised by the linense that was issued upon such application.

While Mr. Malkin, one of the atterneys for the appellant, was on the stand testifying for him, the following occurred: "Mr. Malkin (atterney for appellant): What conversation did you have, if any, with Mr. Barrett at the time the lavy was made? The Court: Are you objecting? Mr. Smith (counsel for plaintiff): Yes. The Court: Objection sustained. Q. When you arrived at the garage

in the appallant contends that "Steve harrett was in possession of the Chrysler subsequent to the alleged to the and had secured the ligeres for the following gent in his name. This candinalvely established that he was the event of the property in question. "The trial court was justified in theling, under the facts of the case, that the plaistiff, and not largett, was in possession of the Chrysler subservent to the citered bill of as as Il appears that Barrett, in his own name, filed the application for the license for the ear for the year 1929, that the pisintiff paid his the smount he exceeded for the license fee, and that she did not know that he used his swn ness in the application. The appellant specified eight grant glas at sameoli to specient out Just ashence judi salani od jud ". Laituder to joshala si bun aviationes jos bas under all the facts and birespeciances of the case the grige facts osserwas not successfully rebuilted by the plainist. The expeliant has cited a manber of personal fujury cooce in which the quarts have held that shere a glaintiff has shown that a license auchor on a ventual of the time of the secifust was issued to the defer lant it made out a aring facie case of ownership of the vehicle in the de-Fandant. In the precent case, the evidence wave that the class. tiff, a working girl, als not know that Narrett had applied for the Misses in his own name, but, assuming that the appellant ands out a prime facts case of aemerskip is farratt by accor that he applied for the license in his are never histories or are nationised that he evidence of the plaintiff entirely rents the oresemption raised by the linence that was inqued upon such capilication.

While Mr. Melkin, one of the otterneys for the appellant, was on the stand testifying for him, the following occurred: "Mr. Malkin (atterzey for appellant): That conversation did you have, if any, with Mr. Marrett at the time the Levy was suder The Court: Are you objecting? Mr. Saith (comment for plaintiff): Yes. The

Court: Objection sections. . C. West von arrived at the navour

did Er. Barrett claim title to the car? A. He did. Q. What did he say? Er. Smith: I object to such statement. The Court: Objection sustained. The appellant contends that the court erred in sustaining the objection to the last question. In the argument in support of this contention the appellant assumes that the proof shows that Barrett was the agent of the plaintiff and that therefore the appellant had the right to show by the witness that Barrett at the time of the levy, the plaintiff not being present, stated that he was the owner of the car and that such statement would be binding on the plaintiff, Barrett's alleged principal. Such a contention requires no answer. Moreover, it appears that when the objection was sustained, the appellant made no offer as to what he expected to prove by the witness. He is, therefore, in no position to claim that he was hurt by the ruling of the court.

We are satisfied that the judgment in the present case is a just one and that it should be, and it is, affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

did Mr. Berrett claim title to the enry 1 he say? Mr. Smith: I object to such stellment. The Court: Cojection quatulesd." The appoilant contents that the court error in sustaining the objection to the last question. In the argument in teory of this continues in input application and last the propert ecologues test bur Tiliniais est le targe est neu lierues test erese the appellant had the right to show by the witness tunt harrett at time of the levy, the plaintiff met bring present, stated that gaibaid ad bilos imenaints has that has and to resee ad ass as on the plaintif. Barrett's alleged principal. Soon a contention requires so unawer. Lerector, it access that then the objection was sustained, the appailant made so offer so it what he supposed to prove by the wildens. At it, thereine, it no pecifies to claim that he say burt by the relies on the court.

To are sucisfied this see for an ase propert code in the propert code is a just code and that it amount he, and it is, affirmed.

Berger, F. J., and beidtey, J., concur.

255 I.A. 619

WILLIAM W. WITTY,
Appellee,

V.

SECURITY TRUST & DEPOSIT CO.,
Appellant.

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

William W. Witty, plaintiff, sued Security Trust & Deposit Company, a corporation, defendant, in the Circuit Court of Cook County, for attorney's fees claimed to be due him. There was a trial before the court, with a jury, and a verdict returned in favor of the plaintiff in the sum of \$3,250. Judgment was entered on the verdict and the defendant has appealed. The plaintiff has not filed a brief in this court.

The defendant pleaded the general issue and filed, in support of the same, an affidavit of merits. Thereafter, by leave of court, it filed an amended affidavit of merits in which it averred that it had a good defense upon the merits as to \$7,500 of plaintiff's claim; that the defendant was not liable to the plaintiff in any manner except for certain services rendered by the plaintiff as an attorney at law to the defendant upon a special contract in which the amount of plaintiff's compensation was fixed at \$190 per day for time employed in court and that no more than ten days were so employed, and that no more than \$1,000 was due to the plaintiff.

In August, 1921, a robbery occurred at the safety deposit vaults of the defendant company and thereafter six suits at law were brought by various box holders to recover from the defendant

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In august, 1911, a rapport occurred to the eafery depositive its of the defendence of the service of the servic

the contents of their respective safety deposit boxes.

The plaintiff sued to recover fees for services in the following cases: Grosaman Shoe Co. v. Security Trust & Deposit Co., Foster v. Security Trust & Deposit Co., Lipschultz v. Security Trust & Deposit Co., Zorn v. Security Trust & Deposit Co., On v. Security Trust & Deposit Co., Luzzo v. Security Trust & Deposit Co., German Hed Carriers' Union v. Security Trust & Deposit Co. and People v. Jones et al. It was conceded by the defendant, on the trial, that whatever court work the plaintiff did in the said cases. he was authorized by the defendant to do and that the only question in the case, save the one as to how the compensation should be determined, was, what actual time was spent in court in those cases. As to the amount of compensation, the plaintiff claimed (a) that he was entitled to reasonable compensation for all services that he rendered in the cases, and (b) that the plaintiff's claim was upon an account stated. The defendant contended that there was a special contract between the parties that fixed the plaintiff's compensation at the rate of \$100 a day for actual time spent in court and that he was to be allowed nothing for other work done on the cases.

At the conclusion of the plaintiff's case, and again at the conclusion of all the evidence, the defendant moved the court to instruct the jury to find the issues for the plaintiff and to fix his damages at the sum of \$1,000. Both motions were denied, and the defendant excepted to the action of the court in denying the motions.

The defendant thus states its position in this court:

"The uncontradicted evidence being that there was a contract between the parties fixing the attorney's fees at the rate of \$100 a day for the time spent in court only and no more. The positive evidence (plaintiff's own evidence) is that no more than ten days were spent in court and that \$1,000 is due to the plaintiff. There cannot be a contract

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The plaintiff and to recover for service in the following occust Granzana these bear to broarday Frank 1 imposts Co., Toutes v. Canada true t i ence i de alla de la caracta ve recept Truck & Twocal Code, Marn V. Curity Times & Largait Co., On v. Security Truck & Connect will be a country Truck & Security Truck & Security Co., Cornel Series " Seion v. wently True : sport vo. and Pagets v. James to al. . it was nonredor by the defendant, as the tring, that shaterer court work the plaintif cit in the suit canno waisens. The art souls may ob the broken one ve bestemites for an - of plugin moistanticos of the time to be off over the cost and appears seems, ours, which his area was a root also very, and As to the assume of compression, the claims (a) that dan' a myyer lie to the about amount of the coldens of the city of he rendered in the case, and (b) this the little of he was see andis last backet on the free on the last seems as about a apparata and the second to the second to the second second as the second as compounded the fact of the call of the state of the sections cours and that be seen to be although not been for the work can-. Eboso bill ma

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both express and implied, pertaining to the same subject matter, existing at the same time. The express contract eliminates any possibility of an implied contract. We submit that, even on the theory that there was an implied contract, under the competent evidence in the case the largest amount plaintiff is entitled to recover is \$1,300. The largest sum as plaintiff's compensation under the competent evidence is not to exceed \$1,500 on account of which he admits receiving \$200. The verdict of the jury was therefore contrary to the evidence."

The affidavit of merits of the defendant averred "that the defendant has not become liable to the plaintiff in any manner except for certain services as attorney at law rendered by said plaintiff to the defendant upon a special contract, fixing the amount of compensation at \$100 per day for time employed in court." The plaintiff introduced this affidavit as part of his case and it is the only evidence in the case that relates to the terms of employment of the plaintiff. The contention of the plaintiff, made during the trial, that his claim had become an account stated and that the amount due was therefore fixed, campt be sustained. (See Henry et al. v. Le Moyne, 219 Ill. App. 313, and cases cited therein.) In our view of the case the only question for us to determine is. how many days did the plaintiff spend in court in the trial of the aforesaid cases. The defendant practically concedes, as we read its statement, that there is competent evidence tending to show that he was entitled to charge \$1,500. We have carefully read the evidence of the plaintiff bearing upon the instant question and we are satisfied that it shows that he spent three days in court in the trial of the Grossman Shoe Co. case; four days in the Superior Court in the trial of the Foster case (there were two trials of this case) and one day in the Appellate Court, when the case was there on appeals three days in court in the trial of the Lipschultz case; two and onehalf days in court in the trial of the On case; two days in court in the trial of the Luzze case; two and one-half days in court in the trial of the German Hod Carriers' Union case, and two days

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-bridge and lade" between in anythe out. To address to disablite adv and long a reserver with all illustrate with of elical court of for and the of the profe blue of be cobson and or tentralism or constrain at active the defendable upon a section to the finite of the amount of penention of all our day for lime employed in court. The glainwill all the same with the state on a factorial beautiful that beautiful that ambuvoluse is assaud will the color of the same will all the colors of the plaintiff. The content of the plaintiff made during and a mile there has not a general of the contract of the mile and in it a least and tent word badde avere our ettle op a till til tenne at ev als an and owen of how of the construction that the sole to be the to the the the and the second of the chill of the contract of wit out tiletern werd o think his or a contained or other and had been been IN THE COIN OF THE BANK HAS BANK BANK BANK BANK TO THE WAR TO BE WAS THE WAR THE W a real refleror and an ar a real even and acceptance to the residence of the LONG TO SEEL TO CLAMBIAG ONE ORDER OF THE POST OF THE SEEL OF THE ENLISE ONE BE the contract of the second of the second of the contract of the second o - on his care the confidence and to have add to be seen at each seems beatt days for the first the first first the first party and the grant tand error in and leadership - one are it hands and to Lucius and the The second of the first property of the second of the seco

in court in the trial of <u>People v. Jones et al.</u> The defendant introduced no evidence to contradict or impeach the plaintiff's evidence in the matter of time spent in the trial of cases. The total time, therefore, spent by the plaintiff in court in the trial of cases was twenty days, and at \$100 per day, the total amount for which the plaintiff was entitled to compensation was \$2,000. It is conceded that he received \$200 on account of services rendered, and therefore the net amount due the plaintiff from the defendant is \$1,800.

The defendant has argued that certain errors were committed by the trial court, but in our opinion it is unnecessary to concider these.

Accordingly, if within ten days the plaintiff files in this court a remittitur of \$1,450, the judgment against the defendant will be affirmed for \$1,800; otherwise it will be reversed and the cause remanded to the Circuit Court of Gook County for another trial.

AFFIRMED FOR \$1,800 ON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

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33578 THE T. A. SMIDER FRESHRVE COMPANY.

a corporation, for the use of Hartford Accident & Indemnity Company, a corporation,

Appellant.

THE PEOPLES TRUST & SAVINGE BARK OF CHICAGO, a corporation.

Appellee.

APPHAL PROM SUPERIOR COURT. COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, The T. A. Snider Preserve Company, a corporation, for the use of Hartford Accident & Indemnity Company, a corporation, plaintiff, sued The Peoples Trust & Savings Bank of Chicago, a corporation, defendant, in an action of assumpsit to recover the sum of \$2,236.08, with interest. The case was tried before the court, with a jury, and after the evidence of both parties had been heard, the court, upon metion of the defendant, directed a verdict for it. Judgment was entered on the verdict and this appeal followed.

The plaintiff filed the common counts and also an affidavit of claim setting forth that the defendant was engaged in the general banking business in Chicago and that the plaintiff, The T. A. Snider Preserve Company, was one of its depositors; that between May 4, 1926, and December 6, 1926, plaintiif drew certain checks on the defendant bank, payable to the order of "David Myron," in various amounts, aggregating \$2,236.08; that each of the checks was subsequently paid by the defendant to an unauthorized person or persons upon the forged and unauthorized indorsement of the name of the payee, and the payments so made charged to the account of the plaintiff; that the beneficial plaintiff, Hartford Accident & Indemnity

SEST.A. 619

THE T. A. SELLED FIGURERY CHEARY, a corporation for the use of Hertford Accident A Indecember Company, a despotation.

Appellant.

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APPEAL PROM

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tiff that the beneficial plaintiff, Warto . cuicus & Intermity

Company, was thereupon obliged to, and did, by wirtue of a contract of indemnity with the plaintiff, pay to it on June 16, 1927, the sum of \$2,236.08, and, upon such payment, became subrogated to the rights of said Preserve Company against said bank, and also received from said last mentioned company a formal written assignment of all its claims, etc. The defendant filed seven amended pleas, the first of which was the general issue. Demurrers were sustained as to the second, third and fifth. The fourth averred a universal custom of banks to keep no record of the payment of checks except the date of acceptance and payment, and the amount paid and charged against the account of the depositor, but to state a monthly account with the depositor and return to the depositor with such statement all checks and vouchers charged against his account, and that it was a part of such universal duatom for the depositor to promptly examine such statement and checks or vouchers, and to promptly notify the bank of any discrepancy therein and to promptly return to the bank any repudiated check or voucher with an affidavit stating specifically the depositor's objection thereto; that in the absence of the repudiation of any check in such manner all payments set forth in such statement of account become proper charges against the depositor's account; that the plaintiff, by opening an account with the defendant acquiesced in such custom and practice, and that it did not so repudiate and return to the defendant bank any checks now claimed to have been improperly charged against its account. The sixth amended plea averred that Paul H. Mart was plaintiff's sales manager for the Philadelphia territory and that he, in the regular course of business, selected and employed salesmen, etc., and approved their saleries and expense items, and that it was within the scope of his duties to make out payroll lists and payroll checks for plaintiff and transmit such checks to plaintiff's office at Rochester, New York, for signature:

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that in the course of such employment he padded the plaintiff's payroll list by adding therete the fictitious name of "David Myron," a non-existing person, known to the plaintiff and said Hart to be such, and that Hart prepared the checks in controversy, payable to said "Myron," and sent such checks to plaintiff's office at Rochester for signature, where they were signed and afterwards returned to said Hart, who thereupon, without authority, indorsed the name of said "Myron" thereon, cached them and misappropriated the proceeds thereof: that said checks were afterwards charged to plaintiff's account; that said checks, though nominally payable to Myron, were, as a matter of law, payable to bearer. The seventh amended plea contains the same averments as the sixth and adds that if the plaintiff, during the time in question, had duly examined its payroll lists, and had compared said lists with the monthly bank statements and vouchers submitted by the defendant to the plaintiff during the time in question the forged indorsements would have been immediately discovered, and that plaintiff's failure to do so made a continuance of such forged indorsements possible. Plaintiff filed replications to the fourth, sixth and seventh amended pleas.

The evidence showed (inter alia) that plaintiff The T. A. Onider Preserve Company, conducted a large business throughout the country and that its gross sales during the year 1926 amounted to \$4,729,355.03; that it employed between 250 and 300 salesmen, district managers, stock clerks and warehousemen, and, in addition thereto, clerical help to the number of 150; that it was a large depositor of the defendant bank and on January 1, 1927, had a surplus balance of \$660,457.19; that Paul W. Hart was employed by plaintiff as district sales manager for its Philadelphia territory; that he engaged the salesmen, stenographers, warehousemen and truckmen for that district, approved all of their salary and expense items, and controlled the activities of these employees in general; that he

that in the course of such esclopment he peared the hairtiffer mayrall list by adding thereto the flutitions new of ' waid Byron, a men-eristing rereas, thought be the claiming and a de West to be sach, and that hart premared the checke in amplicating, payable ha wat the aut the all the color of the set is a street at the set is a street at the color of the set is a set of the set o for signatura, where they core aliment a piecurard resident to oner sid merchat, this called the engagement with ales eatd "Myron" thereen, untiked then mad wishoutenited the processes affiliations of hear to abmner after and advecto bice deci the great secount; that said character though neminally payable to tyron, were, se a matter of law, p vable to bearer. The cor will meaner than estate and the each service of the drawn and the table to the service of the product of il vyaq ual centu. A luo dae entiona al tento nes gaite dill lists, and has compared a fit links when his but most bit sent of compared at tarre that it and a. Jasharles aft at hillimint aredony to time in question the farges indonacueute out have here inverterally special and that similar a supplied to a special transfer the property of toch forget indo-cesents possible. Inimiff tiled replit tions essoir tobacen disperse has distr differ a i or

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approved the salesmen's reports of sale and expense vouchers and sent the same to the Rochester office of the plaintiff, where pay checks, based on such sales reports, were then made out and signed and sent to the payers thereof; that between May 4, 1926, and December 6, 1926, Hart made out pretended sales reports of a fictitious person, designated as "David Myron," giving his address at various hotels throughout the country; that these reports were sent to the Rochester office, together with other genuine reports, for the purpose of having pay checks issued thereon by the officers of the company; that the officials who signed and countersigned the checks made payable to "David Myron" had no knowledge that the payee was a fictitious person; that Hart would then cash these checks at various places in the United States; that in some instances he secured personal indorsements, while in others the checks bear the indorsement of the name of the fictitious payee only; that these checks were in due course presented to the defendant bank, upon which they were drawn, and the defendant honored them and charged them against the account of its depositor, T. A. Snider Preserve Company; that monthly statements, with the cancelled checks attached. were sent to the plaintiff; that the forgeries were not discovered by the plaintiff until March or April, 1927; that Hartford Accident & Indemnity Company issued to the plaintiff a bond insuring it against dishonest acts of Hart and that when the forgeries were discovered the plaintiff filed a claim against said Indemnity Company for the amount of the forged checks and said Indemnity Company paid the claim in full; that the defendant bank collected from prior indorsers the amount of three of the forged checks, aggregating \$207.02.

It is apparent from the record and from the arguments of the parties in this court that the controlling question before the trial court, on the motion to direct a verdict, was the alleged

approved the milesment a reports of same in engene toroner and was the same to the Morkett at the or the plaintiff. burg in the true show needs over appropri and a derivate the transfer and the second and deads and some to the payers theready this bateren for a life, and increber 6. 1986. Hart made out protences acies reports at a ficultiona england in noor all health with the transfer of the action of the continue adi an inan araw aftangar amadi i di igrisma adi imadawatis alaimi normales of the theory that he district the contract of the edf la erect le cal vo acoresi baset effecto vo: antred le esperin company; that the aitleful who adding any conservation of the ker toyer and dads repulsions on see "arry's birall of rivers show so be a figure of the contract and mand phonon one a mare the eliter. Therefore lettering because internegated at the arms of the filter payer only and the third OBLEGES WELL IN CHE COLLEGE DESCRIBER SO SELVED OF THE SERVEY RESIDENCE Light blick and a contract the one offered the contract of the evenuent's reading a " and industrial in temporal and surlang and s to day and the chirty of temperatures of the control of the all the chirthest and th court task. To brow actionally all some all fall of same asset by the plaintiff whith dered or openla livel inch dered on the 12 mairs at moral social states of a second frequency alterested when randrise B. I. June in off strong bodd to be done in the second by the land payers to he at their. First to the for the is it is not sendig towards Tox the accuse it in "own eductes are . In the second paid water out in talk the time does not be the state at a sale of the industrial the appropriate of the constant of ,90, 7008

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negligence of the plaintiff. The defendant contends that "there can be no recovery in this case because the negligent and careless conduct of the Smider Preserve Company caused the losses complained of." The plaintiff contends that "the Smider Preserve Company was not negligent or careless in the conduct of its business." It has been well stated that no rule can be laid down that will cover every transaction between a bank and its depositor, and whether or not a depositor has been negligent, must be determined by the facts and circumstances of the particular case. After a careful consideration of all the evidence bearing upon the instant question, we are satisfied that there was evidence tending to show that the plaintiff had exercised that degree of oure which, under all the circumstances, it was its duty to do. If the case had been submitted to the jury and they had determined the instant question in favor of the plaintiff, in our judgment, the defendant could not have fairly argued that the verdict, in that regard, was unsupported by evidence. On the other hand, we think that the defendant had the right to argue, from certain circumstances in evidence, that the plaintiff was negligent and that such negligence caused the losses complained of. In our judgment, the trial court erred in not submitting the question of the alleged negligence of the plaintiff to the jury. As this case will probably be tried again, we refrain from citing and commenting on the evidence in the record bearing upon the instant question.

The defendant argues, however, that if the question of the alleged negligence of the plaintiff is determined adversely to its contention, nevertheless, the judgment should be sustained. We shall refer to the several points made in support of this contention.

segligance of the plaintiff. The defendent constants there one be no recovery in this case because the negligent and careings conduct of the Unider Freners Company comed the London complained of. " The givill contents time "the initer leader live veryone ". agentous att be tambane and at analytes to tangillar too ser Illy sond more that so man ofthe on loud beant like food and Il endade but todiengeb edi hun kand a mended moldonum i yenye were we beginned to be duen atmostigue most and tolluces a for the a rook, . same malabitrar and la companyante has a set and careful conscior-tion of all has evidence bearing upon the instant cuestion, we are enticated that true was veto the tending ered to serget time plantation and entering and desir and ear "I some as the control of the contro the case had been submitted to the jury and that had determined the instant question in favor of the piniculality in our judgment, the defendant could not have inivit execut that the variable in that regard, one masapperied of sylicate. -u the other hand, we think that the defendent bed the river to ergue, from serious circumstance in evilance, that the plaintiff our schiment and the til . To contrigues asset the leases complities of. In our indepent, the trial cours erred in new sammitting the quastion of the alleged negligines of the plaintiff to the jury. . w this case will probably be tried again, or retrain from 1318/ and omnenting an the evidence in the recent bearing upon inetant apention.

the alleged negligance of the plaintiff is afterious of the alleged negliganes of the plaintiff is afterious. The contention, nevertheless the jungment cherist be customed. We shall notes to the several points and the several points are the several points and the several points and the several points are the several points and the several points and the several points are the several points and the several points and the several points are the several points are the several poi

The defendant contends that an account stated was struck between the defendant and the plaintiff, and it cites certain cases in which it is held that where a bank statement, to which are attached cancelled checks, is sent by a drawer bank to its depositor and no objection is made by the depositor to such statement an account stated is created between the parties. However, the general rule is that an account stated is open to correction for mistake or fraud. (See <u>Leather Manufacturers' Bank</u> v. Morgan, 117 U. S. 96, 107, and cases cited therein.) The defendant further contends that the plaintiff is now estopped from disputing the correctness of the bank statements showing the payment of such checks, because of its delay in notifying the defendant of the defalcations of Hart and of the forgery of the indorsements on the checks, and it cites in support of this contention certain cases holding that an unreasonable delay in notifying the bank of the forgery after a party has discovered the same will preclude recovery. We do not think that this rule applies to the facts of the instant case, but, in any view of the evidence, the most that the defendant could properly ask would be that the jury should be allowed to determine, from all the facts and circumstances, the question as to whether or not there had been an unreasonable delay. The plaintiff strenuously argues that the defendant did not specially plead laches and is therefore in ne position to raise the last contention, but we do not deem it necessary to pass upon this point.

The defendant next contends that "the defendant bank paid the checks drawn upon it by the inider Preserve Company in accordance with the tenor of the instruments, and, therefore there can be no recovery against it." We find no merit in this contention. The checks in question were payable to "David Myron." As there was no such person as "David Myron" it cannot be fairly argued that the bank paid the checks in strict accordance with the tenor of the

The fall of them the total and the transferred ent, o milita o erest of ran y til hadin vald han decless. Out emprised or a field of the control of the control of the least at the state at tracing amoralist of sam, in southy a fire a book or its authority the series of the property of the series of from a fill of the contract and new and for to al help's impor-TO THE TANK I AS ESCAPED BEEN AS A TOP OF THE STATE OF TH fraud. (For Leather Magaif solutary Weak v. [1200a. 117 W. J. wit. 107, and cance wit d therein. ) The defent : firth - cartends that with the about a local termination in the confidence of the confidence with was to a build and and the standing and put room atomical and inner to the fruite application on to a protect of mighton at gates all socio di tun di prifer ella del mante appetit est con la constante est. minost of take courtesten served a cos baidly, or the cut in the whis order in the territor of a contract of the contract of th water to the test of a contract and the first of the all the sales water of the out of the model the line of the cold dealed from inga if the control of a control of the viril will a latter of the moles of the constraint been alse? the defined as a rest symplectic figure . I also a series of · Brog Bills watth cord or Masonson

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instruments. But the defendant further argues that the plaintiff had knowledge, actual or constructive, that the payee named in the checks was fictitious, and therefore the checks were payable to bearer, under Sec. 29 (3), Chap. 98, Cahill's Ill. Rev. Stat. There is no merit in this contention. There was no intention on the part of the plaintiff that the payee in the checks should be regarded as a fictitious person, even if it could be held that such was the criminal intention of Hart, the unfaithful employee. However, Hart indersed the name "David Myron" on each of the checks and neither he nor the bank treated them as being payable to fictitious persons or to bearer. As the checks were not put into circulation by the plaintiff with knowledge that the name of the payee did not represent a real person, section 29 does not apply. (See U. S. Cold Storage Co. v. Central Mfg. Dist. Bank, 251 Ill. App. 279, 284.)

The defendant next contends that "there is no competent evidence in the record to sustain the Hartford Accident & Indemnity Company's right to maintain this suit." The suit is not brought by the Hartford Accident & Indemnity Company but by the Snider Preserve Company. The words "for the use of" are of no legal effect whatso-ever except to show that the usee has an equitable interest in the funds after the same have been collected. (Hobson v. McCambridge, 130 Ill. 367, 375; Tedrick v. Wells, 152 Ill. 214, 217.)

The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSE: AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

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W. C. HANDLEY,

VS.

. H. ROBINSON .

APPEAL VION SUPPLIAN COURT

255 I.A. 620

MR. JUSTICE SCANLAR DELIVERED THE OPINIOR OF THE COURT.

In the Superior Court of Cook County, in an action of assumpsit, plaintiff, W. C. Handley, sued defendant, E. H. Rebinson. On Earch 14, 1929, judgment for \$2,300 was entered as in case of default after defendant's amended affidavit of merits and also his plea had been stricken from the files on motion of plaintiff. Defendant has appealed.

Defendant contends that "the demurrer to the defendant's amended special pleas and additional pleas was improperly sustained." Defendant cannot raise this contention for the reason that the record shows that the demurrer to defendant's special pleas was sustained on January 16, 1929, that on February 28, 1929, plaintiff filed an amended affidavit of claim, and on March 12, 1929, amended his declaration, that on March 14 defendant filed an amended affidavit of merits and that the only plea of defendant then on file was the amended plea of the general izsue.

Defendant contends that "the defendant's amended plea and amended affidavit of merits were improperly stricken from the files."

The declaration, as amended, contains four counts, viz.: (1) the common counts; (2) alleges the indorsement and assignment of a promissory note by defendant to plaintiff, the confession of judgment thereon before maturity against the original maker and his guarantors, the failure of the maker and his guarantors.

w. c. Hanger.

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AFFEAL VALE SUPELLOR OF WITH OUTER.

255 I.A. 620'

AR. JUSTICE CLASSAN DELIVERED FOR OFFICER OF THE COUPLY.

In the Euperior Sourt of Good County, in an action of assumpsit, plaintiff, W. C. Handley, sued defendant, S. H. Robinson. On March 14, 1979, judgment for \$2.300 was entered as in case of default after defendant's anended at idayit of merits and also has plea had been striumen from the file on another of visionitif. Defendant has appealed.

Defendant a second aportal place and allitional place and infendant's seconded aportal place and allitional place and inproperly dustained.\* Defendant names trains the contention
for the remain that the record arous institution desarrant to defendant's notedal place was sustained on later by 16, 1920, that
on Petranty 35, 1939, plaintiff filed on ansuled allidayit of
claim, and an Expon 12, 1960, amended his declaration, that on
March is defendant filed an exercise allicavit of marits and that on
the only place of defendant them on ifle was the amended place of
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Defendant contents the first deficient's a related plea and accede any ideast of merits were in appetly with an first case the file."

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to make payment in accordance with the terms of the note, the issuance of an execution and a levy on the property of the guaranters. a motion by the judgment debtors to vacate the judgment by confession and for leave to defend on the ground that the note was exeouted in blank by them and was filled in by defendant in the instant case in an unauthorized amount; that the judgment debtors were given leave to defend and after a trial the issues were found against plaintiff and the ju ment vacated, of which proceedings and trial defendant had notice; that by his indersement and assignment, defendant warranted and represented that the note was genuine for the full amount shown due by reason whereof defendant became liable to plaintiff for said balance, etc.; (3) contains the same allegations as to the indorsement and assignment, judgment by confession, execution, motion to vacate, trial and judgment, and notice to defendant, and further alleges that by his indersement and assignment defendant warranted and represented that he had no knowledge of any fact which would impair the validity of the note; that plaintiff, relying on those representations and warranties, accepted the note, whereby defendant became liable to pay the balance due with interest, etc.; (4) differs from the second and third in that it sets forth the assignment. Plaintiff's amended affidavit of claim sets forth that the suit is upon a contract of indorsement and assignment of a certain chattel mortgage and note, by which assignment defendant represented that the note was for a certain, liquidated amount, that the mortgage was genuine as against the maker and guaranters, and that defendant had no knowledge of any facts which would impair their validity; that plaintiff, relying upon the representations and assignment, entered a judgment as alleged in the declaration; that the maker and guarantors set up and maintained a defense on the ground that the note was executed in blank and filled in by defendant for an unauthorized and un-

to mean payment in accordance with the terms or "to date, tog the to a structure of the factory and the forest a fine telephone as to seems serior by the judgment decreases as elected among but and the matter a sion and for leave to delend on the ground that he note was and duted in blank by them is an tilled in by delendant in the the mant same from the series and series of the free from the series same states or act agent converte to the fact a first a first against the converte to the against pisiniff; and the far on the exted, of wains arosedings an trea lan languary of I ring you like theilen in harrage to Intro best Berto See、 Marts A. 1978 (1931) - 文 4.2 《1935、中央》 (1935)、 「1935 (中区1935)至复数学 美国超色自由美国影 ,更新性能 the environment to the bound of the control of the lights to element for the clines, the contains the rate will be a stand was not side this opening the commence of the standard base cannot be standard by Pession, emecution, nation to volve, and the flustration and potter to det mouth, and "determent ablances over by between the commence The land of the first and and the first and and the first and the first and find the firs katewisety a st are interested to a control of and villed to a control of the con , solid, the har emple. I seem at opent to be but the first of the first accounted the meta, the refer to the hace to the trace of the to the control of ence two with internal, etc.; (d) this are two the sentents are to 数据 化铁硫化 克里 医糖乳的 医电子器 电电池 计中间数据 。 所其 计正序系统 电影 电影 电影 电影 电影 电影 "我们 and to receive a source of the old or direct ways as to to div THE PROPERTY OF THE STAR BUSINESS OF THE PROPERTY OF THE STAR OF T ser of the service of the service of the ా ా ... గా... 19 ... ' ... గా... గా... కా... కి.మా... కి.మా... కా... కా... కా... కా... కా... కా... కా... కా... the makeum and the control of the co the transfer of the control of the c our fire onto the a or not forther the get of bettill have small

warranted amount, and by which plaintiff sustained damages in the way of money paid to defendant for the note, interest, etc., and that there is due to plaintiff from defendant, after allowing all fust credits, deductions and set-offs, \$2,500. To this affidavit was attached a copy of the note and copies of the mortgage and assignment. The admissions and averments of defendant's smended affidavit of merits that apply to the contentions raised by defendant are substantially as follows: Defendant admits that he sold to plaintiff the note and chattel mortgage sued upon and that by virtue of said sale, transfer and assignment he represented to plaintiff that the note was for a certain definite and liquidated amount and that it was genuine as against the maker and guaranters of eaid note for the balance appearing on its face to be due, and that he had no knowledge of any facts which would inpadr the validity of the note and chattel mortgage. Defendant denies that plaintiff relied on the warranties and avers that plaintiff made an independent investigation of the signatures on the note and chattel mortgage and relied on his own investigation; avers that he was not apprised of the case being set for trial on December 9, 1927, until about ten days before said date; avers that by reason of the short notice he was not afforded a resconable opportunity to participate in the proceedings of the trial "and that he, the defendant, did not testify as a witness, although he handled the transaction of the sale of the automobile, and secured the signature of the maker and guaranters, and knows of his own knowledge that the note and chattel mortgage are both genuine as to everything therein contained; " avers that plaintiff did not demand a jury trial in the Municipal Court; avers that on February 1, 1929, he requested plaintiff to proceed with the prosecution of a writ of error to the Appellate Court "of the Municipal Court case or that defendant be permitted the right to test the said decision

warranted andth, and my white pierally made the day and the way of money paid to detandent i'm the note, trineat, ora, and that have to due to plainted mixi it in a plaint of our at are alleging. dist arealtry deductions and mermotte, or, 5000. In this different was attached a copy of the mate and copies of the copy of the nativent a vicinita ', at a since bit area to all dinner toss mat id their er werter that marry to the mercentione raised by tem Tendent are everyonally as 1921 of the structure of the has the y bown a reston introduction of the agent and this of inter-- we are the second of the constant constant and the constant of the constant the main in distress - rot one ofer out that their of beings while remark the course, we obtained on a 51 term turb." Secongraps ray! or start will no parties a condited off. To bise the tropicatery and file and the as as the two district of the file of the file of time to the contract of the firster fraction for a first of the first BERL ARREST FOR BY DATE . TO IL WELT OF \$110 LAIG TANK WELLOD an extend an end and the content in the content in the content and an end the little la the note and martel or the difference of the corresponding Bosomber I, The T, antil whome include berra are inter the trace TRANSPORT TO FORM OF THE FORM OF THE PARTY O ್ರಾರ್ ಮಿರ್ವಲ್ ಕರ್ನಾರ ಕರ್ನಿಸಿದ್ದಾರೆ ಅವರ ಭಾರತ ಮುಖ್ಯಾಗಿ ಕ್ರಾರ್ಥಿಸುತ್ತಿದ್ದ ಅವರ ಸ್ಥಾರ್ ಮಾರ್ಡಿಸಿದ್ದಾರೆ ಮಾಡುತ್ತಿದ್ದಾರೆ and the first of the second of 一年,一个主动,一个一个个的一个人,一个人们主动作为从,是他要要的人的一个大腿,与某个的一种过去,不敢就是一点是数数是中枢部署 are a fort to the terms. In the hardened to be the transfer that a factor wase I want for the difference of the first state of the first section in the first section i are a ble sile to the training and training the second training tra

in the Appellate Court, but that plaintiff by his attorneys have appeared and objected and that an order was therein entered, reciting that the defendant had made a motion for leave for his attorneys to enter their additional appearance in said case and that upon objection upon benalf of the plaintiff by his attorneys, the said motion was denied."

The Practice Act requires that the affidavit of merits shall specify "the nature of the defense," and the interpretation of the quoted words is thus stated in <u>Harrison v. Rosehill Cemetery</u> Co., 291 III. 416, 421-2:

"The defendant must not only file an affidavit stating that he verily believes he has a good defense to the suit upon the merits to the whole or a portion of the plaintiff's demands, but he must state the kind or character of the defense, and it necessarily must be a legal defense which could be made under his plea."

Defendant contends that one defense set up in the affidavit of merits is that by reason of the short notice given him he was not afforded a reasonable opportunity to participate in the proceedings of the trial had in the Municipal Court. Defendant admits that he was notified "about ten days before said trial was had." and. while he had the right, under the law, to meet the defense interposed by the maker and guarantors of the note, he does not aver that he offered or desired to defend the suit or participate in the trial, or that he informed plaintiff that the defense interposed was untrue, although he avers that he handled the sale of the automobile "and secured the signature of the maker and guarantors," and knew the defense to be untrue; nor does he aver that he requested plaintiff to secure a pentponement of the trial, nor does he state that he offered himself as a witness. The affidavit fails to make out a prima facie showing that defendant did not have notice in apt time of the proceedings in question or that he was deprived of an opportunity to meet the defense interposed by the maker and guaranters in the Appollate Lourt, but that plaint by his atternum news appeared, news appeared and objected and to a an ender was therein entered, new citing that the defendant had rank t acterior for lave of the acterior to enter their additional expension in raid come and that upon objection upon boards of the citating allowed to the citating and doubled."

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of the note. The conduct of defendant in ignoring the trial in the Municipal Court, wherein he was charged with serious misconduct, was not that of an honest or prudent man.

Defendant contends that "another defense in such affidavit of merits is that the defendant was deprived of the opportunity
to have said cause tried by a jury, as plaintiff did not demand a
jury and when defendant was notified, it was then too late for the
defendant to secure a trial by jury. \* \* \* The plaintiff had the
right to demand a jury trial when the judgment in question was
opened up to allow a defense to be made thereto." Defendant has
not cited any sutherity holding that he was entitled, under the
law and the facts of this case, to have the issue submitted to a
jury. The submission of the issue to the trial court, instead of
a jury, does not show a lack of good judgment nor a want of good
faith on the part of plaintiff. If the defense interposed could
have been successfully met, defendant is to blame for the failure.

Defendant's last contention is that the affidavit set up a good defense in that it avers "that on February 1, 1929, he had requested of plaintiff that plaintiff proceed with the prosecution of a writ of error to the Appellate Court of the First District of Illinois of the Eunicipal Court case or that defendant be permitted the right to test the said decision in the Appellate Court, but that plaintiff by his attorneys have appeared and objected."

This contention is without the slightest merit.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRED.

Barnes, P. J., and Gridley, J., concur.

of the moto. The conduct of defendant in ignoring the trial in the Municipal Court, wherein he was charged with mericus missenduct, was not that of an honest or prudent con.

day's of merico in that the defendent was deprived of the epocriunity to merico in that the defendent was deprived of the epocriunity to have said cause tried by a jury, as visinist did not decaud a jury and when defendant was notified, it was then too late for the defendant to accurs a trial by jury, \* \* \* The cluinist had the right to decand a jury trial when the judgment in question was equived up to allow a defende to be made thereto. The orderit has not cited any authority bolding that he san emiliated, under the jury. The subminsion of the inche to the trial court, increase of jury. The subminsion of the inche to the trial court, increase of a jury, does not show a last of good jud ment nor a mait of good firth on the part of picinisis. It the defense interposed sould have been successfully met, defendent is to blame for the fallers.

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Defendant's lest controllon is that the willderit set

The Justment of the Superior court of veek courts in affirmed.

Bernen, P. J., and drining, J., concur.

33605

SAMUEL BRIGHT, Appellant,

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SAN LIPAVSKY et al., Appellees. 255/I.A. 620

APPEAL PROM SUPERIOR COURT.

COOK COUNTY.

MR. JUSTICE SCANLAR DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, Samuel Bright, plaintiff, obtained a judgment by confession against Sam Lipavsky, Rose Lipavsky and Hyman L. Cohen, defendants, in the sum of \$8,492. Thereafter, on motion of defendants, the judgment was vacated. Plaintiff has appealed from this last order. Plaintiff has not filed a bill of exceptions.

Plaintiff contends that the court erred in vacating the judgment by confession. There is nothing before us but the common law record and this does not preserve for our consideration the ruling of the court upon the motion of the defendants to vacate the judgment. The fact that the motion of the defendants was copied into the common law record is not sufficient to save the point.

Plaintiff contends that the court erred in dismissing the suit. The record recites that after the judgment was vacated plaintiff declined to proceed further in the case and thereupon the suit was dismissed; but, in any event, in the absence of a bill of exceptions the action of the court in dismissing the suit must be presumed to be correct.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

DEET.A. 620

APPEAL TOWN TOWNER.

SAMUEL BRIGHT,

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CAM LIPAVERY et al.,

MR. JUTTECK LCARLAN FILLVERSA THE OFFICE OR THE COURTY.

In the Superior Court of the knowly, "cased Bright, being the knowly, cased by confeasion as liast "on knowly, plaintiff, obtained a judgment by confeasion, in the sum of the Cohen, defended, in the sum of the Thursestier, on motion of defender, the judgment was vacated.

Plaintiff has appealed from this last order. Thankiff has not filed a bill of exceptions.

Plaintiff contends the court error in racing the judgment by confession. There is naching the judgment by confession. There is naching the court and this does not preserve to our countder tion whe ruling of the court upon the rotton of the distance in the fact that the metten of the defendance was copied into the course has record to not the defendance was copied into the courses law record to not the defendance was copied to the courses as the courses law record to not the defendance was copied to the courses the courses and the record to not the correct to prior.

Plaintiff contends the court of the court of a dimissing the suit. Indeed of the court of the second of the second of the second of the court till desilated to proceed further in the court of the clinical second of the court in the court of the courtes.

the jasignert of the saperiar of Gook County is affirmed.

AF Indust.

Barron, ". J., and 'ridley, J., concur.

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EHLIAN J. SAVAOR.

T.

CLAUDE W. MORRIS and WICHOLAS M. ELLIS, Appellants. APPEAR NUMBER COURT OF CHICAGO.

MR. JUSTICE SCAPLAR DELIVERED THE O INION OF THE COURT.

In the Municipal Court of Chicago, in an action of the first class, William J. Savage, plaintiff, sued Claude 8. Morris and Micholas M. Ellis, defendants. The case was tried before the court, without a jury, and there was a finding in favor of plaintiff and his demages were assessed in the sum of \$3,907.60. Judgment was entered on the finding and this appeal followed.

The fourth amended statement of claim sets forth a contract in writing, dated April 21, 1916, signed by plaintiff and the two defendants, whereby plaintiff agreed to purchase from the defendants, and the defendants agreed to sell to him a certain lot therein described, for \$627, to be paid by plaintiff within a certain time; that plaintiff duly paid the purchase price in full, but that the defendants wrongfully refused to convey the lot to plaintiff and thereafter conveyed the lot to another at an increase in price, and that plaintiff is entitled to damages in the sum of \$4,000. The defendants, in their affidavits of merits, admitted the contract but denied that the plaintiff had paid the purchase price in full, and alleged that by reason of plaintiff's default defendants had forfeited the contract, and the Statute of Limitations was also set, up as a defense.

The defendants contend that "the entire debt is barred

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by the Statute of Limitations." This contention is based upon the assumption that the suit is not upon a written contract but is based upon a contract partly in writing and partly eral and that therefore the five-year Statute of Limitations applies. The claim of plaintif is based upon a written contract, and therefore the five-year Statute of Limitations does not apply.

The defendants contend that "the judgment is manifestly contrary to the greater weight of the evidence." After a careful consideration of all the facts and circumstances, we are natisfied that this contention, save as it is urged against the amount of the damages assessed, is without the slightest merit.

The defendants contend that the court erred in its rulings on the admission of testimony. As to this contention it is sufficient to say that on a trial by the court without a jury, this court will not presume that the admission of improper evidence misled the court below, but it will be presumed that the court did not consider any immaterial or improper evidence in reaching a decision, especially where, as in the present case, there is proper evidence to justify the judgment. (See <u>Bigian</u> v. <u>Skach</u>, 247 Ill. App. 644.)

The defendants next contend that an improper measure of damages was used by the court in rendering its finding and judgment; that "on an action for breach of contract claimed by the vendee against the vendor, the measure of damages is the increased fair cash market value of the land over the contract price on the day of the breach (209 III. 488, at 498 and at 500), plus the moneys paid," or "on the other hand, treating the contract as rescinded, it is held in O'Brien v. Quirk, 204 III. App. 448: 'Then the vendor of real estate refuses to make a deed, or comply with his undertaking, the purchaser is entitled to recover whatever money he may have paid.' There are those two courses open to the vendee: rescission, which entitles him to have his money paid back - probably with interest;

by the latter that the suit is not upon a written contract but is hand agons as unpiten that the suit is not upon a written contract but is hand upon a contract of thit wherefore the fire-year takes of plaintiff the door a written constant, and therefore the five-year constant of their that fine fire-year constant, and therefore the five-year country.

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or a suit for damages, which entitles him to an amount to be determined by the value of the property at the time of the breach. He cannot expect to be compensated twice for damages."

The plaintiff made the final payment (\$50) on the contract in October, 1918, and a clerk of the defendants promised to mail him a deed for the lot. In November, 1918, plaintiff called for the deed and the defendant Morris stated that there was no record that Savage had paid the \$50 and refused to give him the deed. Morris also stated that he had forfeited, or would forfeit, the contract, and the plaintiff then offered "to pay again the \$50 balance on the contract," but Morris refused to accept the \$50 and subsequently he sent a written notice to the plaintiff in which he stated that he had "decided to exercise the option given me in said contract and herewith declare same forfeited and determined, together with all payments made thereom," and on September 30, 1921, the defendants made a contract to sell the lot in question to one Siegfried.

The following is the manner in which the court assessed the plaintiff's damages:

"The Court finds for the plaintiff and assesses the plaintiff's damages at \$3,907.60 in accordance with the contentions of plaintiff, which are as follows:

Date of Payment		Nature of Payment	Amount of Payment	Interest from Date of Pay't @ 5% to & including September 30, 1921.	
1916	April	12th Principal	\$ 50.00	\$ 13.67	
	April	12th Principal	50.00	13.67	
	May	8th Principal	15.00	4.05	
	June	8th Principal	15.00	3.99	
1	July	7th Principal	15.00	3.93	
	AME.	7th Principal	15.00	3.86	
	Sept.	8th Principal	15.00	3.80	
	Oct.	10th Principal	15.00	3.73	
	HOY.	lat Interest	12.45	3.06	
*	MOA.	10th Principal	15.00	3.67	
	Dec.	8th Principal	15.00	3.61	
1917	Jan. avef	31st Principal	15.00	3.50	
	March	26th Interest	10.75	2.43	
	Oct.	12th Interest	11.75	2.33	
1918	Jan.	25th Principal	42.00	7.73	
	Jeb.	25th Principal	40.00	7.20	

or a suit for desagou, which estitles him to an assunt to be drivered aimed by the value of the property at the time of the broads.

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		mains	155.00	28.13		
June	12th	Principal	100,00	16.50		
July	lat	Principal	50.00	8.12		
Oct.ago		Principal	50.00	7.29		
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of the land related to that period of time, and the court, in its findings, adopted this theory, at the request of the plaintiff. We are, therefore, not in a position to adjust the damages upon the basis of the market value of the land in Movember, 1918. We may add that the plaintiff's method of determining the increased value of the land on September 30, 1921, who an erroneous one.

The evidence, however, clearly shows that the defendants, without justification, refused to comply with their undertaking, and therefore plaintiff in entitled to recover back whatever moneys he may have paid on the contract, plus interest. To find from the evidence that in October, 1918, the plaintiff had paid the defendants, on the contract, in principal and interest,\$673.43. From October, 1918, to the date of judgment there was a period of a little over ten years. The interest on \$673.43 for ten years at five per cent amounts to \$326.70, which, added to \$673.43, makes the amount due the plaintiff \$1.010.13. Therefore, if plaintiff will within ten days file a remittitur of \$2,897.47, the judgment of the Municipal Court will be affirmed for \$1,010.13, otherwise the judgment will be reversed and the cause remanded.

AFFIGURE UPOR EVERTHING.

Barnes, P. J., and Gridley, J., concur.

of the leds related to the period of the, and the court, in its findings, adopted this through, at the request of the lishbold, to are, therefore, not in a polition to edings the compact plant in appears the court of the last in develop, 1918, a may add that the plantiff's mark of the determinant the increase value of the last on aptends on aptender 10, 1921, we concerns one.

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Angeles, F. J., and Gridley, J., contact,

33623

HARRY M. SEERM, AARON SAX and NATHAW GLICKSBERG, Appellants,

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LOUIS FISHMAN and HERMAN FIDLER, Appellees. APPEAL PROM SUPERIOR COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiffs, Harry M. Stern, Aaron Sax and Nathan Glicksberg, sued Louis Fishman, Mayo Friedberg, Herman Fidler and Mitchell Zelins (sometimes spelled Mitchell Zelens) in the Superior Court of Cook County in an action in case. The suit was dismissed as to Friedberg and Zelins. The mmended declaration charged fraud and deceit. The defendants Fishman and Fidler filed pleas of the general issue. The case was tried before the court with a jury and at the end of plaintiffs' case the court directed the jury to find the defendants not guilty on the ground that a certain instrument signed by plaintiffs was a release of the defendant Zelins and not a covenant not to sue, and that it therefore operated as a release as to all of the joint tort feasors.

Judgment was entered on the verdict and plaintiffs have appealed.

The instrument which the court construed as a release is as follows:

"Know All Men By These Presents that we, Harry M. Stern, Nathan Glicksberg and Aaron Sax of Chicago, Illinois, for and in consideration of the sum of Ten (\$10.00) Dollars to us in hand paid and other valuable consideration paid by Mitchell Zelens also designated as Mitchell Zelins of Chicago, Illinois, receipt of which is hereby acknowledged, do for ourselves, our heirs, executors, administrators and assigns agree and covenant with the said Mitchell Zelins, his heirs, executors, administrators and assigns; that we will not at any time or times hereafter

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mue, prosecute, molest, attach, trouble or bring any action, cause of action or make any claim or demand upon the said Mitchell Zelins, his heirs, executors, administrators and assigns arising out of a certain cause of action now pending in the Euperior Court of Cook County, case No. 440368, entitled Harry M. Stern, et al vs. Louis Fishman, et al and do hereby agree to dismiss out of said suit, the aforesaid Mitchell Zelins.

It is expressly understood and agreed that this instrument shall not be held or be construed to be a release but it should

be held and should be construed as a covenant not to sue.

It is further understood and agreed that if this instrument is pleaded in any action brought against the party paying the consideration to this covenant, it shall constitute a good defense to such action.

In Witness Whereof we have hereunto set our hands and seals

this 21st day of March, 1927.

Aaron Sax (Seal)
Harry H. Stern (Seal)
Nathan Glicksborg (Seal)

Witness: John H. Bishop\*

The plaintiffs contend that "the instrument given by the plaintiffs to Zelens was a covenant not to sue and not a release and the Court should not have directed a verdict on the ground that the instrument was a release and released all the joint tort feasors." This contention is plainly a meritorious one. (See Wixon v. City of Chicago, 212 Ill. App. 365, 386; Rethschild & Co. v. Griffiths, 214 Ill. App. 29, 33; City of Chicago v. Babcock, 143 Ill. 358, 363; Parmelee v. Lawrence, 44 Ill. 405, 408.) Defendants contend that "whether the instrument is a release or not, is of no particular significance, in view of the fact that we have shown that plaintiffs failed to prove the material allegations of the amended declaration. by reason whereof the Court correctly directed the jury to render its verdict for the defendant." We have carefully considered this contention of the defendants and we find it without merit. Other points raised by the defendants in support of the judgment are also without merit.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

Barnes, P. J., and Gridley, J., concur-

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WALLEE E. LOEBER,
Appellant.

255 I.A. 620°

APPEAL FROM SUPERIOR COURT.

COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Otto B. Lawrens sued Waller E. Loeber, in the Superior Court of Cook County, in an action in trover. The case was tried before the court, with a jury, and a verdict was returned in favor of plaintiff in the sum of \$3,400. He remitted the sum of \$107.51 and judgment was entered for \$3,292.69. Defendant has appealed.

On March 8, 1926, plainteff borrowed from defendant \$1,000 and gave to defendant his promissory note in a like amount, payable in ninety days, and twenty-five shares of Swift & Company stock as collateral security. The note contained the following:

"Having deposited with said payee, as collateral security for the payment of this or any other liabilities of the undersigned, or either or any of them, to the legal holder hereof, due or to become due, or that may be hereafter contracted or existing, however acquired by said legal holder,

the following property:
 Certf #6.0. 249817 - 25 Shares Swift & Co.
said property being hereby by the undersigned valued at \$2875.
Said collaterals, or any part thereof, and the proceeds of the sale thereof, or any part thereof, shall be applicable to any other note or claim whether due or not, held by said payee or his a ssigns, against the undersigned, or any or either of them; and the said holder or its assigns shall have the same rights and powers to hold, sell or dispose of said collaterals, or any part thereof, in respect of and as security for said other note or claim, as are herein granted with reference to this note."

The note was not paid when it became due. In August, 1926, plaintiff arranged to purchase an automobile from the Marquardt Motor Sales Company and about the same time requested defendant to make him a

255 J.A. 1668

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The note was not paid view it a ver due. In survey 1, 1926, picinsist arranged to purchase an neuropile from the enqueric late: along and about the erre time request. Arranged to rest the case of the company and about the erre time request.

further loan of \$1,000, which he said he needed to make the "down payment" on the car. For some time prior to this request defendant had been engaged in selling to certain individuals prospective memberships in a proposed corporation to be known as the Castle Garden Golf & Country Club, and plaintiff was also interested in the scheme. There was an account in a certain bank known as the Castle Garden Golf & Country Club account and at the time of the request there was approximately \$1,100 in it, all of which had been obtained by defendant from the sale of memberships to prospective members. Plaintiff admitted that this bank account "consisted of money derived from memberships which Mr. Loeber sold in the Castle Garden Golf & Country Club." Defendant testified that at the time of the request the following (inter alia) occurred: "I (defendant) said, 'I tell you what I will do. If there is any reason why this golf course is not completed and I am required to return the money to these people, I will loan this \$1,000 out of there if it is agreed that this be held against the Swift & Company stock as additional collateral . And he said, 'Yes.' \* \* \* I said. 'If there is any reason why this golf course don't go through I must return this money to the people who made the deposit on anticipation of membership in this club. " On September 15, 1926, defendant drew a check on the Castle Garden Golf & Country Club account for \$1,000, payable to the order of plaintiff. The check was signed: "Castle Garden Golf & Country Club By W. E. Loeber Sec'y and Treas." On the reverse side are the signatures of the defendant and Marquardt Motor Company. The check was paid Movember 1, 1926, and it is clear from the testimony of both parties that this \$1,000 was used in the purchase of an automobile for plaintiff from the Marquardt Motor Company. At the time the automobile was purchased defendant also advanced to plaintiff \$63. Thereafter

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a misunderstanding arose between plaintiff and defendant and the club was never incorporated and the plan to erganize the same was abandened. Defendant testified that he then paid back to the prospective members the \$1,100 which they had paid "in anticipation of their memberships," but this testimony, on motion of the plaintiff, was stricken out by the trial court on the ground that it was immaterial. Thereafter plaintiff tendered to defendant the sum of \$1,055 in full payment of the note of March 8, 1926, and demanded the return of the stock held as collateral, but the tender was refused on the ground that there was due defendant in addition to the \$1,055 the sum of \$1,063 that was paid by defendant towards the purchase of the automobile and that the collateral security, under the terms of the note of March 8, 1926, covered this last amount.

Defendant contends (inter alia) that the verdict is against the weight of the evidence, and we have reached the conclusion that this contention is a meritorious one. As the case will probably be tried again we refrain from further analyzing and commenting on the evidence of the respective parties. We deem it necessary, however, to refer to one important question involved in the present contention. The theory upon which plaintiff succeeded in the lower court, and upon which he stands in this court, is that the Golf & Country Club was a partnership venture of plaintiff and defendant and that the bank account of the Castle Garden Colf & Country Club was an account of this partnership, and that therefore defendant cannot set up in the present suit - an action at law - the claim for the \$1,000 that is based on the check of September 15, 1926; that to permit him to do so would be to allow an accounting of the partnership dealings between the parties in an action at law. As to this contention it is sufficient to say that the evidence clearly establishes that the Golf & Country Club bank account represented, in its entirety, a trust fund - not a

a misunderstanding orose between plaintiff you defendant use the club was never incorporated and the plan to puremise the dark to the abandoned. Defendent testified the houthan paid back to the properties ambers the \$1.40 hier they not paid has to the properties ambers the \$1.40 hier they not paid in manistry.

Of their memberships," but this testimony, on motion of the plain-tiff, was stricken out by the trial court of the properties the claim to the case of imministry. The case of the case o

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The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

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Bornes, P. J., and Bridgey, J., concor-

33648

MAY CUMMINGS.

Y.

MAGGIE 3. WINDHAM, Appellant. 255 I.A. 621
APPEAL FROM NUMBER OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in an action of forcible entry and detainer, May Cummings, plaintiff, sued Maggie C. Windham, defendant. The case was tried before the court, with a jury, and a verdict was returned in favor of the plaintiff. Meither the defendant nor her counsel was present in court during the trial. On February 14, 1929, judgment was entered on the verdict. On February 19, 1929, the defendant moved to have the judgment vacated and filed two efficients in support of the same, and on February 21, 1929, the motion to vacate was overruled. The defendant has appealed from this last order.

The defendant contends that "the denial of motion to vacate judgment was an abuse of discretion on the part of the court, prejudicially against defendant."

The defendant in the present suit was personally served, her appearance was entered, and she demanded a jury trial, and under such a state of the record it is the settled law of this state that a motion to set aside a judgment is addressed to the sound judicial discretion of the court, and its action will not be reviewed except for abuse. The maving party must show both diligence and a meritorious defense. It is unnecessary to cite

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In the Huntelpal Carry of Chicago, in an action of foreible easy and detainer, May Carrings, plaintiff, successful for italians, defineent. The core we trie before the court, sith a jury, and a vestion returned in favor of the plaintiff. Teliber the icf or a mor have coursel we a recent in court earing the iriel, who "browey le, 1820, the quenct as subserved as the vertice. As vertice, as the vertice, as the vertice, as the vertice, as the content andre to have the and on the or fell with the support of the armite. The foreign tries of an income when we receive who we require the first or the content of the foreign the second who we required. The first or the second who we required and foreign the second who were the foreign of the foreign of the second who we required.

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authorities in support of this rule. It is also the law that want of diligence on the part of the attorney binds the client. (Eggleston v. Royal Trust Co., 205 Ill. 170, 177.) It appears from the affidavita that on Saturday, Vebruary 9, 1929, the defendant and her attorney, Mr. Ferguson, appeared before one of the judges of the Municipal Court and demanded a jury trial, and that thereupon the case was transferred to Judge hooney, one of the judges of that court. The parties to the suit and their attorneys then repaired to the courtroom of Judge Rooney and there the attorney for the defendant stated to the court that he would be in Springfield on Menday, on a motion before the Supreme Court, and that he would not be back in Chicago before Tuesday or Wednesday morning, and thousupon the case was set for trial for Thursday morning, February 14, at 9:30 a. m. On that date, when the came was reached for trial on the call, neither the defendant nor her attorney appeared, and a jury was evern to try the issues, and after the plaintiff had introduced her evidence the court directed a verdict in her fayor. Mr. Ferguson, in his affidavit, states that "while the jury was signing their verdict, one Martin appeared and told the Court that affiant was before the Supreme Court." This statement of the attorney is, of course, based on hearsey. There is nothing in the affidavita to show who Martin was, or that he had any right or authority to represent the defendant before Judge Rooney. So far as the affidavits disclose, the first time. after the cause was set for trial, that anybody representing the defendant appeared before Judge Rooney, was on February 19, 1929, when the motion to vacate was made by her attorney. Counsel for the defendant made his motion before the Supreme Court on February 15, and the motion was then taken under consideration. We have carefully considered the affidavit of Mr. Ferguson, and in our

authorities in support of this rule. It is also the law that were of diligance on the part of the citormer binds the electric samedate il ("Lat "OLT "TIL 902 "" En tent lesel e metertat) from the billdayibe that on Jeturday, Vebruary 9, 1938, the defendant and her attarney, Hr. Forguess, appeared before one of the judges of the Euclideal Court and demended a jury trial. and that the reason the east was transferred to Judge housey, and Tieds bore sive was as abstrac off . The parties to be well and to ereit has report rade to morning of the server ment stades dispersion for the defeatant minimum of the court land for wealth in Springfield on Manday, on a motion before the " war one Court, and that he would see he back is Chlosgo before Tucaday or womenany marming, and thereapes the cone was set for tribel for Thursday meralus, Fabruary 14, at 9:30 e. m. On that date, when the conse was non the the base of the cast tour allers and that to be and base was attorney appeared, and a jury man wears to try the language, and medneth trues old somebly and browner the filling all med to a verdict in her favor. Mr. Freguen. in his officavit. states that "while the jury was righing their verdict, one Martin apperrad and told the fourt that are been seen the fluoresse fundaments This nimberson of the siteries in, of correct to hones de hourage. There is nothing in the Wildeville to show who Martin was, or that he had any right or utherise to represent the deferring pergre Judge Roomsy. Do far as the of tearing disclose, the first sime, after the cause and set for triple and conjugate the same defendant appeared before duige Normey, wer an Petrancy 19, 1929, when the motion to reserve was and by her arterny. Comment for the defendant made his motion betwee the agreeme Court on Vebruary 13, and the metien was then teken under consideration. "a kare eardilly considered the allicavit of Mr. Telguson, and in our

judgment it fails to affirmatively show that he was not in Chicage on February 14, at the time the case was called for trial, and, certainly, it makes no showing as to why he did not have someone represent him at that time, if he was not able to be present. The defendant was present before Judge Roomey on February 9, when the case was set for trial, and she did not appear in court on February 14. In the reply brief filed by the defendant, her counsel has attempted to interject into the case alleged facts not shown by the record, but it is hardly necessary to state that we cannot consider these. So far as the record discloses, the first time either the defendant or her counsel appeared before Judge Roomey after the case was set for trial, was five days after the entry of judgment.

We are satisfied, after a careful consideration of the affidavity, that the defense the defendant seeks to interpose to the present suit is an equitable one at most, and forcible detainer is an action at law, and an equitable defense cannot be set up to such an action. (O'Brien v. O'Brien, 195 Ill. App. 346. Other cases to the same effect might be cited.) If the facts upon which the defendant relies were sufficient to warrant a decree in her favor she should have resorted to a court of equity and applied for an injunction to restrain the further presecution of the present suit until the suit in equity could be heard and determined. (See Grubbs v. Boon, 201 111. 98, 104.) It does appear from the affidavite that sometime prior to the present suit the plaintiff sued the husband of the defendant for possession of the premises in question and that the defendant appeared and defended the suit, and that a judgment was entered in favor of the plaintiff from which the defendent prayed an appeal, but that the appeal was never perfected; that thereafter she filed a bill in the Circuit Court of Cook County and moved the

judyment it tails to affirmatively sher that he was not in Chicogo on Zerrany 14, at the time the case was called for trial, and certainly, it makes no shering on to may be did not have commone reprocess him at that time, if he was not able to be process. The defendant was present before Judge Ronney on February 9, then the ones was set for trial, and she did not appear in court on February 14. In the roply brief filled by the defendant, her counsel has attempted to interject into the case alleged facts not shown by the record, but it is hardly ascessary to rest that we connot consider these. So far as the record discloses, the first time cither the defendant or her record discloses, the first time cither the case defendant or her record discloses, the first time cither the case defendant for trial, was five days after the satery of judgment.

Te are authorises, after a careful consideration of the affidavita, that the defunce the defendant ceeks to interpose to the present suit is an equivable one at most, and foreible detainer is an action of the one equitable defence common to set up to such an action. (O'Svien v. O'Svien, 186 Ill. App. Ods. Dehem saacs to the same offect might be afted.) If the facts upon which the eds royal red at across a ingrees of trainifitur erry soller inchestos chould have recorted to a court of coulty and applied for on injunction to restrain the further prosecution of the present cuts until the entt in equity could be heard and determined. (See Trubbe v. Moon. 201 111. 88, 104.) It does appear from the efficiently that emachine prior to the present suit the plaintiff seed the heebrad of the defendent for possession of the premises in question and light the defendant appeared and ceffended the wait, and that a indepent on categod in favor of the plaintiff from which the defendent preyed an appeal, but that the opposit was never porfected that the thereafter she filled a bill is the Circuit Court of County and mayod the chanceller for an injunction to restrain the enforcement of the judgment for possession against her husband, and that after a hearing the motion was denied.

After a careful consideration of the present appeal, we are satisfied that the trial court did not abuse its discretion in denying the motion of the defendant to vacate the instant judgment, and the judgment of the Humicipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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Berney, F. J., and Gridley, J., concens.

33648

EDEURD F. TUOHY, JOHN F. POWER and JOSEPH A. McHERNEY, Jr., Executors of the Estate of Joseph A. McInerney, Deceased, and JOHN F. POWER, Individually, Who Formerly Did Business with the late Joseph A. McInerney as McInerney & Power, Defendants in Error,

¥ .

HEMRY ULIRICH, Plaintiff in Error.

255 I.A. 6212

ENROR TO THE
CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAR DELIVERED THE OPINION OF THE COURT.

Edmund P. Tuchy sued Henry Ullrich in the Circuit Court of Cook County in an action on the case for libel. In February. 1928, a judgment was entered against Ulirich for the sum of \$3.000. He prayed an appeal to the Appellate Court, but the appeal was never perfected. On Murch 12, 1928, McInerney & Power, attorneys for Tuchy in the libel suit, filed in the office of the clerk of the Circuit Court of Cook County a notice of attorneys' lien. This notice contained (inter alia) the following: that Tuchy "has agreed to pay us for our services as a fee one hundred dollars and a sum equal to one-half of whatever amount may be recovered therefrom by suit, settlement or otherwise, and that we claim a lien upon said claim, demand or cause of action for such fee." On March 23, 1928. Tuohy filed with the said clerk a satisfaction of Judgment in which he acknowledged "full satisfaction of the above judgment this 3rd day of March, A. D. 1928, the said judgment and costs having been paid." On July 14 McInerney & Power filed their sworn petition setting forth a contract for legal fees between Tuohy and the petitioners and averring that they had served on Ullrich, on March

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12, 1928, a notice of attorneys' lien and that they had filed the notice with the said clerk. The petitioners prayed the court "to adjudicate their right in the promises and that this Honorable Court enter judgment for the amount which may be shown to be due your petitioners." On October 16, 1928, the cause was heard and an order was then entered, containing (inter alia) the following:

"And it appearing to the Court that a judgment was entered in the above entitled cause on the 4th day of February, A. D. 1923, for the sum of Three Thousand Dollars (\$3000.00); that said petitioner Joseph A. McInerney and John F. Power, doing business as McInerney & Power, have a lieu on said judgment by reason of the contract entered into with the said Edmund P. Tuchy, that on to-wits the 12th day of March, 1928, a notice of said lien was filed in the office of the Clerk of this Court and that a copy of said notice was duly served upon the defendant, Henry Ullrich, on the 13th day of March, 1928;

And it further appearing to the Court that the said Joseph A. McInerney and John F. Power, doing business as McInerney & Power, have fully complied with the statute in such case made and provided, and the Court further finds the issues for the said Joseph A. McInerney and John F. Power, doing business as McInerney & Power, and against the defendant Henry Ullrich, and assesses Joseph A. McInerney and John F. Power, doing business as McInerney & Power, damages at the sum of Mifteen Hundred Dollars (\$1500.00).

It is therefore ordered, adjudged and decreed that the said Joseph A. McInerney and John F. Power, doing business as McInerney & Power, shall have and recover of the said Henry Ullrich the sum of Fifteen Hundred Dollars (\$1500.00) and

judgment as hereby entered therefor."

Ullrich prayed an appeal from the order and filed an appeal bond in the sum of \$3,000 but he failed to file a transcript of the record in this court in due time and his appeal was dismissed. He now seeks to have the judgment of the Circuit Court reviewed by writ of error. No bill of exceptions has been filed in this court.

Plaintiff in error contends that the transcript of the record filed in this court contains no placita for the October term, 1928, when the instant judgment was entered. It is true that the transcript of the record filed by him contained only a placita for the March term, 1926, but the defendants in error, by leave of court, have filed a supplemental record containing a placita for the October term, 1928.

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IL. 1928, a notice of records, then and that they had filed the manufaction of the court "has adjustioned the thrift in the president line this manufaction for the court court called the the analysis which may be chosen to be end your patistioners." On October 16, 1948, the court as heart and an orner was then entered, wentsing (inter alse) the following:

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sufficient to show the legal organization of the court which has heard and determined a case sought to be reviewed. (Leafgreen v. Leafgreen, 127 Ill. App. 184; Paul v. Weber, 223 Ill. App. 257; City of Alton v. Heidrick, 248 Ill. 76, 79.)

The plaintiff in error contends that "the record in the case at bar shows no notice whatever served upon the defendant; neither does the finding of the Court in its final order and judgment recite that the defendant has any actual notice of such proceeding," and therefore the judgment rendered against him cannot be sustained. The statute provides that "on petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than five days' notice to the adverse party, adjudicate the rights of the parties and enforce such lien in term time or vacation." That the plaintiff in error had actual knowledge of the proceedings is apparent from the fact that he prayed an appeal from the judgment and filed his bond. If the plaintiff in error had occasion to complain that he had not been served with the statutory notice of the hearing, that fact should have been made to appear by a bill of exceptions. Moreover, we may also presume from the finding in the judgment order that the defendants in error "have fully complied with the statute in such case made and provided," that there was proof of proper notice, especially in the absence of a bill of exceptions.

The plaintiff in error contends that Tuohy and he had the right to adjust the judgment at any time and that the attorneys' lien attached only to what was actually paid by the plaintiff in error to Tuohy and that as the petition contains no allegation as to the actual amount of the settlement and as the court in its order makes no finding in that regard the judgment against the plaintiff in error for one-half of the amount of the judgment rendered against him in the libel suit was erroneous. The court, in the judgment order, assessed the

cufficient to mace the legal organization of the apart vitoh has heard and determined a over cought to be reviewed. (Leafining v. Leafining v. Heidrich, 248 111. Vo. 79.1

The plaintiff in arrow contents that I core it core in ouse se bar share as notice whatever served upon the defendants meither does the finding of the Caurt in its final order and judge -ran than: To bolden Landan was and dustanted out tail officer team demino mid Ingland harbura Anomonil and eretered bus ". mil bess be santained. The statute provides that "on potition filed by such attermer or their chiefe and court of competent furtadistion soull, on not less than five days' notice to the edverus party. adjudicate the rights of the perties and enteres aced lies in lean and from the are the care at this see that the care are of the proceedings to apparent from the fact that his proved as appeal from the judgment and filet bis band. If the plaintiff in error and occasion to complain that had not been error with had chatakary makida of the heartha, thet fact chauld nave been made to appear by a bill of orceptions. Moresver, we may also presume from the fineing in the judgment order that the defere nin in error "have rully complied with the accourt in each area and provided." this thore was preaf of prepar solica, aspect light in the commer of a fill of exceptions.

The plaintif is error constands that light and he and the right to all the plaint test that to adjust the judgment of an time of the line judgment of an time of the plaintiff in election attacked only and that re the petition conteins no allegalist in election of the estimant and no ter court in its order radon or that and no the parties of the judgment and no ten plaintiff in error for another in the another of the judgment and the plaintiff in error for another the another of the another in the function of the sections of the judgment the applied him in the the another has the the another the function order, assessed the

damages of the defendants in error at the sum of \$1,500, and in the absence of a bill of exceptions it will be presumed that the finding of the court was warranted from the evidence.

The plaintiff in error contends that the satisfaction of judgment filed by Tuchy purports to have been executed on March 3, 1928, and that as the plaintiff in error was not served with a notice of the claim for attorneys' lien until March 12, 1928, no claim for lien could arise against the plaintiff in error. The satisfaction of judgment was not filed until March 23, 1928, and we must presume, in the absence of a bill of exceptions, that the proof warranted the court in finding that the judgment in the libel case was not satisfied until after notice of attorneys' lien had been served on the plaintiff in error.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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demages of the defendents in error at the sum of \$1,500, and in the she absence of a bill of exceptions it will be presumed that the finding of the court was verranted from the evidence.

The plaintiff in error contends the satisfaction of judgment filed by Tudy purports to have been curreied on March 5, 1926, and that us the plaintiff in error was not served with a motice of the cinin for attorneys' lies until March 12, 1926, no claim for lies could arise against the plaintiff in error. The moticientian of judgment was not filed until harch 23, 1928, and we must procuse, in the absence of a bill of exceptions, that the proof verrunted the court in finding that the judgment in the liber once one not satisfied until after notice of attorneys' lies had been served on the plaintiff in error.

The fudgment of the Chromit Court of County is affirmed.

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Barress, P. Jo, and Cridity, J., squeer,

THOMAS I. COONSY.

Defendant in Error.

COURT OF CHIC GO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Thomas J. Cooney, plaintiff, sued G. H. cholz, defendant in the Eunicipal Court of Chicago, in an action of contract. The case was tried before the court, without a jury, and there was a finding in favor of the plaintiff and his damages were assessed at the sum of \$530. Judgment was entered on the finding and the defendant has sued out this writ of error. The plaintiff has not filed a brief in this court.

The plaintiff is an undertaker and embalmer and sued to recover for goods furnished and services rendered in the burial of the defendant's wife. The affidavit of merits avers that the plaintiff does not know that the defendant furnished the goods and rendered the services claimed, and that if the plaintiff did furnish the same he did not do so at the request of the defendant; that the defendant never employed the plaintiff and that no demand was ever made upon the defendant for the payment of the plaintiff's bill and that the defendant does not know whether or not \$643.40 is a fair and reasonable charge for the goods and services alleged to have been rendered.

One of the witnesses testified that the plaintiff had been appointed administrator of the estate of the deceased wife and that he had filed his application for appointment upon the ground that he was a creditor of the said deceased and had not been paid

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and the micro with Jamis 100 21 93 acceptable only to part been appointed administrator of the entake of the personal distance word in the file of the contract that the contract and food the thing is a district the the special blood one to got bridge a new sai field

his bill. The same witness also testified that the deceased left no money or estate. Whether, or not, the plaintiff filed a claim against the estate does not appear. The defendant, citing the above facts, contends that the plaintiff cannot assert his claim against the defendant "until he has shown that he has exhausted the estate." As stated in <u>Veinstein v. Lotsoff</u>, 252 Ill. App. 566, 569, at common law a husband is under a legal obligation to bury his deceased wife. The same case holds that the husband, not the estate of the wife, is primarily liable for the expenses of the wife's funeral. There is no merit in the instant contention.

The defendant contends that the plaintiff failed to make any proof as to the items of the plaintiff's claim and the reasonable-ness of the charges. This contention is a meritorious one. It is clear, however, that the plaintiff has a just claim against the defendant and should have another opportunity to properly prove his case.

The judgment of the Numicipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMARDED.

Barnes, P. J., and Gridley, J., concur.

his bill. The ceme vituess also to tilted that the decement left no money or estate. "sather, or not, the plaintiff filed a claim squines the estate does not appear. The defendent, eliting the above facts, contends that the plaintiff enough assert als claim against the defendent "waith he had shout he had asked into refuse." In defendent in felleting v. lotself. 322 lile pp. 154. 564. The common law a impound is under a legal collection to early his described effect the bushand is defendent the husband, not the sates of the rife, is primarily liable for the expanses of the sife's function. There are the income contention.

The defend at contends the liminists of is and the sense any proof on to the items of the pininiss of is and the renegable ness of the charges. This contention is a cartistions one. It is blear, however, that the pininiss is a turism and the defendant and cheese another opportunity to properly processis ones.

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Barnes, P. J., and Oridley, J., conour.

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CHICAGO TITLE AND TRUST COMPANY, as Trustee,

Appellee,

V.

CELLE BECKER et al., Defendants.

CELLE BECKER.

appellant.

255 I.A. 6214

INTERLOCUTORY APPRAL

FROM AN INTERLOCUTORY

ORDER APPOINTING THE

FOREMAN TRUST & SAVINGS

BANK REGEIVER, ENTERNO

IM THE CIRCUIT COURT OF

COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by Gelle Becker to have reviewed an interlocutory order of the Circuit Court of Cook County appointing Foreman Trust & Savings Bank receiver for the apartment building located at the northwest corner of Kemmore & Hollywood avenues. Chicago. The order was entered upon the amended and supplemental bill of complaint filed by the Chicago Title & Trust Company, trustee, to foreclose a certain trust deed given by Celle Becker about June 29, 1927, to secure the principal sum of \$250,000 and interest.

On February 11, 1929, R. I. Davis and the Chicago Title & Trust Company, trustee, filed their bill of complaint to foreclose the above mentioned trust deed on the property aforesaid. On February 14, 1929, Judge Brothers, one of the chancellers of the Circuit Court, appointed the said bank receiver for the said building and the rents and profits thereof. Thereafter the appellant, Celle Becker, filed her sworn answer to the said bill, and on March 16, 1929, Judge Brothers, upon her giving a bond in the penal sum of \$35,000, signed by her, as principal, and the Matienal Surety

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Company, as surety, to obtain the discharge of the receiver, entered an order directing the receiver to surrender the property to her. On March 22, 1929, the Chicago Title & Trust Company, trustee (sole complainant) filed a verified amended and supplemental bill to foreclose the said trust deed and to have a receiver appointed. This bill alleged (inter alia) that Celle Becker was indebted in the sum of \$250,000, as evidenced by her note; that said note was secured by a trust deed to the complainant as trustee, conveying certain real estate and the rents, issues and profits therefrom; that by said deed Celle Becker expressly covenanted to make certain deposits on account of principal and interest, to pay all taxes and assessments, and not to nuffer any mechanics' liens to attach, and that she further covenanted that in case of default in the payment of any installment of principal, or in case of default for three days in making the payment of any installment of interest, or in case of default for a period of twenty days in the payment of any deposits, or in case of a breach of any of the covenants, the complainant (Chicago Title Trust Company, as trustee), for the benefit of the holder or holders of the note, should have the right immediately to foreclose said trust deed. The bill further alleged that Prudence Company, Inc., was the original holder and owner of the mortgage note, and that on August 11, 1927, it sold the note to Supreme Council of Royal Arcanum and that by the sale it guaranteed to said Council the payment of the principal of the note and also the payment of the interest on the same at the rate of five and one-half per cent from August 11, 1927, and that it retained the right to exercise any right or option secured to or insured by the note or trust deed, including the right to enforce payment thereof; that the mortgagor (Celle Becker) has defaulted (1) in the payment of the balance (\$225.26) of the semi-annual interest that fell due June 17, 1928; also in the payment of the full semi-annual install-

Company, as sureby, to obtain the discart st. a the terriver, tirulore and rubus rust of rivisors and pulibrative robro as bereins Om March 25, 1909, the other of This t Trust Congary. · xod es Introvelous by because ballic v bolil (Junalal rece elev) setemas bill to forestend the said fract and to have a received This bill alleged (latter with) that Celle Backer was indebted in the come of \$150,000, or evidenced by her makes that alight wooders on thanking on any my mult first a to be total ear etch converted carbata real estate six the repeat in a care of befreeness. In every rate of alls book blac and a di imparanti news server in dependent of the contract of the period in the server in the contract of the co all sease and aspendents, and not be cuffer our mechanics' limes figuren la culo un redi beinamevos reditul ede Jeni ban edeciis ed in the payment of eny impositation of principal, or in case of da-To intellibed que le incorpa and matton al explosues tol ilust interest, or is come of defealt for a cerice of twenty days in the payment of the for the cours of a course of a correct of the correct anne complaines full vage True or read and the companies of true or the companies of the co for the besetts of the melder or helders of the mate, alsoud have the right immediately to the class and truck deed. The bill furtions mileged that reduced Campany. The . : . a bin original coller and and bles of all tall languages in Judi but asses to making out to manus the sire and the fact one werenet leve to flowed owners in a see eden till te inginalty til to themse g til literate bine et beeftering syll le plan this . The sell on Jeens all this to snampy out outs bus and one-half per once from eques is 1900, and the titre colored right to exercise any might or eption error . In the ared by the there is such that and an indian be the cut or construction of the that toe moregages (Colle beckey) has televised (1) in the payment one lit to the depresent Levines-lines wis to (SE. 2888) sometime and to June 17, 1938 when in the payers of the for a consequent in the ball-

ment of interest that fell due December 17, 1928, amounting to \$7,500, which defaults have continued for more than three days; (2) in the making of monthly deposits on account of principal since the month of June. 1928, which aggregated \$4.545.40, and which defaults continued for more than twenty days; (3) in the failure to pay the 1926 general taxes, amounting to \$4.212.83 and permitting a sale of the premises therefor; (4) in the failure to pay a special assessment and for permitting a sale of the mortgaged premises for the sum of \$101.35; (5) in permitting the premises to be subjected to the lien of eight mechanics' liens and thirty-one judgments; (6) in permitting the premises to be sold upon three execution sales. It further alleged that Prudence Company, Inc., in compliance with its contract of guaranty, had advanced certain moneys to Supreme Council of Royal Arcanum equal to five and one-half per cent of the past due interest, but that neither the mortgager nor anyone in her behalf had paid said interest; that Prudence Company, in its own right and as agent for Supreme Council of Royal Arcenum, had declared the whole debt to become due and payable, and the complainant, Chicago Title & Trust Company, as trustee, had elected to foreclose said trust deed; that the trust deed expressly pleages the rent. issues and profits, and provides for the appointment of a receiver without notice and without bond, and without reference to the value of the premises or the use of the same as a homestead, and without reference to the solvency or insolvency of the mortgagor; that the mortgaged premises in their present condition offer scant security, and that the mortgager is insolvent; that the mortgager, in violation of her covenants in the trust deed, has collected rent in advance; in excess of \$8,000; that the complainant has been compelled to incur certain expenses, including solicitor's fees; that the mortgaged premises are subject to four junior mortgages, and to the claims of various persons, and to outstanding certificates of sale, and

as maistrant and the traductor and the fall senses to sum \$7.500, which defended have concluded for more that there cans (2) is the making of meathly deposits on everual of principal since the manth of June, 1985, which agarenated \$4,565.47, and which defaults continued for hors then twenty depay (2) in the filler to ner the lift were to be not be not the to \$4.612.35 and permitting Introduce of the promises there is the I flate to be any a special The supplies and for I to be a large follows the supplies of the supplies the contract the contract of the con beforene of the assistant out priciliting at (8) 180. ILLS be out to the lies of city morestant lions and thirty-and for manks; (6) in permitting the premines to be seld upon three exception sales. If intier alleged that Frederic Yespeny, Ito., in compliance with its centract of success, had advisced certain marge to supreme off to Jose the 'Llad-one bag avi' o. I'm a matera Lagos to Llouws red al amoras ton tor toring row and transion that due the teach out being men edi ni , vangmo. sorrepera 2. de sarrefori bloc blad bed Tindod -the and an agent for Capress overil of Lovel vermen, but do clared the whole dobt to be one do prychia, and the completence, Chionge Title ! Truet Company, as trouber, he enterte to for yolden . Supr off a groit vi marge dark a und and Inda ibab faund bise isous and profits, and proven for the appointment of a reculyer esite end of menos it is such and reaches the end on the ment of indist. Item indistract and a notable and the very self to applicate and to will for transport on the terralization to the terralization and all as assistation endianous in ou as to notify mos darance winds at routery becaused and the core marger of the transfer the core con the core of her corrants in the trime coor, this collects rant in worder mone of belingers read and end end of mer set inde 1000. 81 to assume certain expenses, including solicitor's fore; that the mortgrand To calcio ent of his grayayeror rotant, their at further our contant  prays for the foreclosure of said trust deed and for the appointment of a receiver during the pendency of the proceedings. Thereafter the appellant filed her verified answer to said amended and supplemental bill and therein alleged (inter alia) that she had paid \$20,000 usurious commission to Prudence Company; further, that the note and trust deed sought to be foreclosed were owned by the Supreme Council of Royal Arcanum and had been in its possession continuously since 1927: denied that said Council had authorized R. I. Davis or the Chicago Title & Trust Company, trustee, to institute foreclosure proceedings, and denied any default in interest payable in June . 1928: averred that a guaranty policy in the sum of \$250,000 had been issued by the Chicago Title & Trust Company, guaranteeing the lien of the trust deed; further averred that the Prudence Company, before advancing any of its loans, insisted that the appellant furnish to the owners of said indebtedness herein a mortgage guaranty policy of the Chicago Title & Trust Company in the sum of \$250,000, to protect the said owners against any liens and defects in the title, judgments, tax sales, mechanics' liens or claims or rights of parties in possession to the extent of \$250,000, and that the appellant furnished such policy to the Frudence Company, Inc., of Illinois and to the Chicago Title & Trust Company, as trustee.

On March 29, 1929, complainant, Chicago Title & Trust Company, as trustee, moved the chancellor (Judge Brothers) "for the appointment of a Receiver, or in the alternative, for a reference of said motion to a Master in Chancery," and on April 6, 1929, the said chancellor "ordered that the motion of complainant be referred to Reswell B. Mason, Master in Chancery of this court, to take proofs of the respective parties, with reference to the appointment of a receiver." On May 9, 1929, the master made a report in which he recommended that a receiver be appointed. Objections to the report were overruled and on May 13, 1929, the cause came up for

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hearing before Judge Friend, a chancellor of the court, on a motion of the complainant to set for hearing the objections to the master's report, and on motion of the solicitor for appellant it was ordered that the objections filed to the master's report stand as exceptions. On May 15 Judge Friend entered an order overruling the exceptions to the master's report and appointing Foreman Trust & Savings Bank as receiver for the premises in question.

The material findings of the master, so far as this appeal is concerned, are: (1) That a receiver of the premises for the rents, issues and profits aught to be appointed: (2) that the allegations in the amended and supplemental bill with reference to the provisions of the trust deed and the alleged defaults were true; that the following were the defaults: (a) Default in the payment of interest due June 17, 1928, in the amount of \$225.26: (b) default in the payment of the full semi-annual interest due December 17, 1928, amounting to \$7,500; (c) default in the payment of the 1926 general taxes in the amount of \$4,212.83, and that the premises have been sold therefor, and that no redemption has been made from said sale; (d) default in the payment of a special assessment for \$101.35, and that the premises, because of said default, had been sold and that no redemption has been made thereunder; (e) that the mortgagor has permitted the premises to be subjected to the lien of eight separate mechanics' liens for various amounts ranging from \$62.76 to \$2.695, and (f) has suffered additional defaults in permitting the premises to be subjected to the lien of thirty-one judgments, varying in amount from \$52.35 to \$3,226.45; that twelve of the judgments were entered after July 11, 1927, the date of the recording of the trust deed in question, and that nineteen were entered prior to July 11, 1927; that as to the judgments that were entered prior to July 11, 1927, the mortgage guaranty policy for \$250,000, furnished by appellant, protects the legal holder of the indebtedness covered by the said trust deed against the same; that the beering before Judge Triebd, a chanceller of the court, on a motion of the complainment to set for hearing the objections to the marter's report, and on motion of the solicitor for appoint it was ordered that the objections filed to the marker's report stand so stoeptions. On May 15 Judge Friend outered an order prescribed the exceptions to the marter's report and appointing foreman front is invings Book so the marker's report and appointing foreman front is invings Book as receiver for the presises in question.

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answer of the appellant does not deny or dispute the validity of the judgments rendered since July 11, 1927; (3) that the value of the premises, land and improvements, is \$300,000 and is scant security for the mortgage debt; (4) that appellant is no longer the owner of the equity of redemption, but that said equity is vested in Martin J. Ahern, one of the defendants, by virtue of a judgment, levy and vale, and the issuance of a bailiff's deed and a quit-claim deed from Carey W. Shodes and wife; (5) that the complainant is not bound to take a bond in lieu of the rent, since rents have been collected in advance, and the bond in any event would be security only for the rents collected after its execution and would not cover rents wrongfully collected in advance.

The appellant has seen fit to argue that R. I. Davis, one of the complainants in the original bill, did not own the note that formed the basis of the foreclosure proceedings and that she never had any right or authority to declare the note due or to file the foreclosure proceedings. As the instant appeal is from the order appointing a receiver upon the amended and supplemental bill filed by the Chicago Title & Trust Company, trustee, alone, we deem it entirely unnecessary to pass upon the merits of this argument.

The appellant contends that "after Judge Brothers appointed a receiver for the property and required Celle Becker, appellant, to furnish surety bond in the sum of \$35,000, upon such terms and conditions as he required, to protect mortgages on rents then Judge Friend should not have sat in judgment of Judge Brothers and order and appoint a receiver and again take property." This contention has been argued strenuously and with considerable feeling, but we are unable to find the slightest merit in it. It was Judge Brothers who entertained the motion of the complainant in the amended and supplemental bill, for the appointment of a receiver, and referred it to the master. We find nothing in the record to indicate that

enemy of the appellant come set dear of dispute the volue of the judgments remises, included the time volue of the presides, land and improvements, in 1200,000 and in count the presides, land and improvements, in 1200,000 and in count according for the mortgage debts id; that appellant is no longer the country of redemption, but that said equity in vertal in Martin J. Americ, one of the desired and equity in dead and equity-than levy and cole, and the instruction of a tanknown; the cole from Ourcy . Thedre and wife; (5) that the complainment is not dead from the point in the office the complainment is not countries to the countries and the total and countries and the countries and the countries and the countries and reach and countries.

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Counsel for the appellant made his motion before Judge Friend to have the objections of appellant to the master's report stand as exceptions, and, so far as the record shows, the hearing before Judge Friend on the master's report was had without any objection by the appellant. Judge Friend had jurisdiction to hear the proceedings in question and we must assume, in the absence of any showing to the contrary, that the matter came on before him in due course. The present contention of the appellant is clearly an after-thought and it hardly merits notice.

The appellant contends that the complainant in the amended and supplemental bill had no legal right or authority to bring foreclosure and receivership proceedings; that Supreme Council of Royal arcanum, alone, could maintain the said proceedings. The amended and supplemental bill alleges that the complainant, Chicago Title & Trust Company, as trustee, pursuant to the provisions of said trust deed and for the purpose of protecting the holders and owners of said note, and pursuant to the powers vested in it as trustee, under the laws of the State of Illinois, has elected, and does by the filing of said bill elect, to foreclose the lien of the trust deed. The power of the said trustee to file the bill is clearly conferred by clause five of the trust deed. The bill also alleges that Prudence Company. in its own behalf and as the duly authorized agent of Supreme Council of Royal Arganum, had declared the whole of the principal sum due. Moreover, it appears that Supreme Council of Royal Arcamum and also Martin J. Ahern not only did not oppose the appointment of the receiver in the present proceedings but that they apparently favored it. We find no merit in the instant argument of the appellant.

We have carefully read the record and we are satisfied that the master gave the parties before him a full and fair bearing

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Counsel for the appoilant made his series before Judge Friend
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and that his findings were amply justified by the evidence, and we are unable to see any merit in the contention of the appellant that the appointment of the receiver was not warranted under the facts. In arriving at this conclusion we have not deemed it necessary to consider that part of the master's report wherein he finds that the appellant's equity of redemption had been sold to Martin J. Ahern and that therefore she had no longer any right, title or interest in or to the mortgaged premises or to the rents, issues and prefits therefrom.

The interlocutory order of the Circuit Court of May 15, 1929, is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., conour.

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ABMER T. BOWEN, JOSEPH BEEN, FRANK P. ATKINSON and LAUGA GRIFFITHS, copartners, trading as A. T. BOWEN & CO., Bankers, Appellees,

V.

PETER P. CROARKIN,

Appellant.

255 I.A. 622

COURT. COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action of assumpsit. Abner T. Bowen, Joseph Been, Frank P. Atkinson and Laura Griffiths, Co-partners, trading as A. T. Bowen & Co., Bankers, plaintiffs, sued Peter P. Groarkin, defendent. There was a trial before the court, with a jury, and at the close of all the evidence the court instructed the jury to return a verdict for the plaintiffs in the sum of \$5,336.14. Judgment was entered on the verdict and this appeal followed. The declaration consisted of two counts. In the first it was alleged that the defendant, on January 4, 1927. made his promissory note, bearing the same date, by which he promised to pay, one year after the date thereof, to the order of Patrick H. O'Donnell the sum of \$5,000, with interest at five per cent per amnum; that the note was delivered on the same date to O'Donnell, and that thereupon O'Donnell assigned the note, by indersement, to the plaintiffs. Count two consisted of the common counts. Attached to the declaration was a copy of the note and an affidavit averring (inter alia) that before the maturity of the note O'Donnell indorsed and delivered the same to the plaintiffs and that they are now the bona fide helders of it. The defendant filed a plea of the general issue

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and also four special pleas. In the first he alleged that the note was assigned to the plaintiffs after it became due; that the consideration for the same was the agreement of O'Donnell to perform certain legal services in connection with a criminal case then pending in Cook County; that O'Donnell, then a member of the Cook County bar. failed to perform proper legal services in connection with the trial of the said case and that therefore the consideration for the note failed. The second special plea alleged that O'Dennell agreed that he would render proper legal nervices which would prevent the conviction of the defendant's son in gaid criminal case and that the note would not take effect as a note if the son were convicted. The third special plea alleged that O'Donnell agreed to hold the note and not negotiate it and to return it to the defendant if the legal services he rendered did not prevent the conviction of the defendant's son. The fourth special plea alleged that O'Donnell agreed not to negotiate the note, and to hold it so that it might be renewed if the defendant so desired. To each of the special pleas the plaintiffs filed a replication alleging that they became holders of the note before maturity, for value, in good faith and without knowledge of any defects in the title of O'Donnell, as alleged in each of the special pleas, and to the first special plea the plaintiffs further replied that O'Donnell did perform the legal services in question and in a careful, diligent and skillful manner, and to the second. third and fourth special pleas the plaintiffs further replied denying the agreement alleged in each of the said pleas.

The only issues raised on this appeal are, first, have the plaintiffs proved that they are bona fide holders of the note, and, second, are there any facts and circumstances in the case from which a fair and reasonable inference might be reasonably drawn that the plaintiffs are not holders in due course.

The Megotiable Instruments Act defines a holder in due

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course as one who takes the instrument under the following conditions: "l. That the instrument is complete and regular upon its face. 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The note in question is an ordinary promissory note in the usual form and there is nothing on the face of the instrument to excite suspicion or to raise a question in the mind of the taker of any defect in the title of O'Donnell or of his right to negotiate it. The note, by its terms, became due on January 4, 1928, and the undisputed evidence is that the plaintiffs became the holders of the same on February 12. 1927. On this last date, and for many years prior thereto, plaintiffs were co-partners engaged in the banking business at Delphi, Indiana. Patrick H. O'Donnell was anatterney of prominence, practicing at the Chicago bar. He owned considerable land in the neighborhood of Delphi and was very well known to the plaintiffs. He had been for a number of years a customer of the plaintiffs and had been in the habit of obtaining loans from them and giving his notes therefor. His indebtedness to the plaintiffs would vary from \$5,000 to \$20,000. On February 12, 1927, he was indebted to them, between \$7,000 and \$8,000.on two promissory notes, both of which were then past due, and upon which interest had not been paid for a considerable time. One of the notes, dated June 13, 1922, was executed by O'Donnell and Frank H. Smith for the sum of \$5,400, and was payable to the order of the plaintiffs one year after the date thereof, with interest at eight per cent per annum. The other, a demand note for \$3,232.62, dated February 12, 1926, was executed by O'Donnell and payable to the order of plaintiffs, with interest at eight per cent per annum. Prior to February 12, 1927. plaintiffs had several times written to O'Donnell concerning these

course as one who takes the instrument ander the fellowing condisions. "Le That the im remove is complete and require upon the fact. 2. limb he became the indier of it beiere it as evertee, and without notice that has been previously dishemouse it seed it and 3. That he took it to good faith and for taling. .. Thet he als als se gram lini you to resign on but hi mis of bedationed man it will "Lie inciriteres and the calle of the parent of the incire actual actions and the called The most in question is en ordinary pract. Cory note in the uncol far. the selection and the selection of the factor of the selection of the selection will be selected the selection of the selecti edit na jesteo yan iz zedej ene le beile edit di Belisebe a seisu es 10. tite of wisomeric or of his right to make it. The mate, by ten bernet second due on demany e, lear, and the continue of crimes the contract of the contract of a cartification of antique of the contract of and as on this less date, and for many years print thereis, plantaities. were compared an ending the the beginning basiness at height, include. Patrick M. O'longell . no an ablance, of or makenego, presidence at the ingle. to hear phiston out at their electricisms of the bar the control of and was very well know to the plaintife, as had been for a master of years a sestance of the picintiffs and a beam in the table of obtaining lease lrow them are gaving his near therefor. the includeeducate to the plaintiffs would very from Council to five a line of the THEY 12, 1927, he was indebted to them, between \$1.00 one, \$8,250,00 the promissory actes, test of which were than is towe, and with the interest had but been gold for a conerc. the size, ne or the octors deten fune 13, 1823, and executed to be need to be a first for end introduct, and he is been and ad aldered any and adapt to make the year after the date thereof, with intercut as tight por this per annual The other, a demand note for \$3,000, dated heart by is, issis was executed by O'longell and payeble to the nor of beingift, elth is erest at eight per sent per acres. Prior to February 14. 1927, equal today ones linus: " of anistra could lavered but allianing

past due notes. In response to these letters the latter, on
February 12, 1927, went to plaintiffs' bank at Belphi, in company
with his private secretary, and he there produced the note of the
defendant and indersed the same and delivered it to the assistant
cashier. At the same time O'Donnell stated to the latter that the
defendant was a man worth \$50,000 or \$100,000 and that the note was
perfectly good and that he wanted to deposit it as collateral security
for his loans; that later on he would be able to pay semething un
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them/that he wished to leave the note of the defendant with the bank
to secure the loans in order that the bank might feel perfectly safe
in reference to his indebtedness. The assistant cashier took the
note, examined it, and then "pinned it to the principal note for which
it was deposited for collateral security."

"It is the well established law in this jurisdiction that an indersee of a negotiable note who has taken it, before its maturity, as collateral security for a pre-existing debt and without any express agreement is deemed a holder for a valuable consideration." (Elgin Nat'l Bank v. Goecke, 295 Ill. 403, 407.)

"Then negotiable paper is indorsed and transferred before maturity as collateral security for a loan of money then made, the pledges, who takes the paper without notice of any defense is a holder for value in the usual course of business." (Anderson v. Keystone Supply Co., 293 Ill. 468.)

The defendant contends that the note in question was not intended as a negotiable instrument, and that the title of O'Donnell to it was defective because he had guaranteed the defendant that the latter's son, who was then a defendant in a criminal case, would not be hanged or go to Joilet penitentiary and that if the result of the trial in the Criminal Court were unsatisfactory to the defendant he (O'Bonnell) would return the note to the defendant; that the son of the defendant, as the result of the trial in the Criminal Court was sentenced to the penitentiary at Joilet and that the conduct of the trial by O'Donnell was unsatisfactory to the defendant, and that therefore the consideration for the note completely failed. In

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reference to this contention we may say that the defendant offered evidence tending to support the same. This evidence, of course, would not be binding on the plaintiffs unless at the time they received the note they had notice of some infirmity in the instrument or of some defect in the title of O' onnell. But the defendant further contends that "the plaintiffs received said note with some knowledge of its defects and infirmities for they knew it was given for services to be rendered by O'Fonnell who, they knew, was a very sick man, and, therefore, unable to perform them."

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." (Sec. 56, ch. 98, Callaghan's Ill. St. ann., Vol. 6, p. 5354.)

"Only but faith will defeat the title of the endorsee of commercial paper taken before maturity, for value and without knowledge of any defease thereto. Mere suspicion, the knowledge of circumstances calculated to excite suspicion, or even gross negligence of the endorsee in acquiring the paper, will not defeat his title." (Kavanagh v. Bank of America, 239 Ill. 404, 408.)

After a careful consideration of all the facts and circumstances bearing upon the instant contention of the defendant, we are satisfied that the undisputed evidence establishes that the plaintiffs took the note as collateral security for a pre-existing indebtedness of O'Donnell, before it became due; that it was taken by the plaintiffs in the usual course of their business as bankers and that there was nothing about the instrument or the circumstances surrounding the transaction, at the time of the delivery of the note to the plaintiffs, that was calculated to excite suspicion of any infirsity in the instrument or of any defect in the title of O'Donnell, or of his right to negotiate it, nor is there any evidence, nor are there any facts or circumstances, from which a fair and reasonable inference might be reasonably drawn that the action of the plaintiffs in taking the instrument in question amounted to bad faith.

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The defendant has searched the record in a strenuous effort to find facts or circumstances that might justify his contention that the case should have been submitted to the jury. Each of the two notices sent by the plaintiffs to the defendant contained the following printed form at the top of the letterhead:

"A. T. Bowen & Co., Bankers
Established 1837 - Over 89 years continuous business
without default in their Obligations.

Money received on deposit subject to check; interest
paid on deposit subject to check 3 to 4† per cent; on
certificate of deposit 3 to 5 per cent. Money loaned on
approved personal or real estate security. Prafts issued
available at all points. ceured notes bought at fair
rates. Notes collected, when paid upon notice, for 25
cents per \$100, or fraction thereof; when further effort
is required, at resonable rates. Peposit your soney in
some Bank and Make all your payments by Bank Checks, which
is the safest, surest and best way." (Italics ours.)

The defendant uses the portion of the above form which we have italicised as a ground for a contentian that the plaintiffs "never got the note for collateral; they got it after maturity for collection 'at 25 cents on \$100.00." As the defendant has failed to call our attention to any evidence, having any probative force, that tends to suctain the contention that the plaintiffs got the note "after maturity" for collection at 25 cents on \$100.00," the present contention hardly merits notice. The assistant cashier of plaintiffs' bank frankly stated that he had read in the Chicago Tribune that the son of the defendant had committed murder and that O'Donnell was one of the attorneys for the defense and that at the time that the latter gave them the note he assumed that it represented attorney's fees in connection with that case, and James .. Meagher, a witness for the defendant, testified that about three and one-half months after the commencement of the instant suit, he, in company with the defendant, went to Delphi and called at the plaintiff's bank and that "cither Mr. Been or Mr. Bowen said that they knew at the time that the note was received that Mr. O'Donnell was a very sick man," and the defendant argues from this evidence that "the plaintiffs received said note with knowledge of some

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of its defects and infinities, for they know it was given for services to be rundered by C'Donnell, and knew that he was a very sick man and therefore unable to perform them. \* \* \* And know that the trial would start on the Monday following, the 14th instant, because they said they read about the case in the newspapers, then they were charged with sufficient notice and knowledge that he was unable to try the case and unable to earn such a fee as \$5,000.00, and that such a claim would in all probability be contested; then, as prudent men and experienced business men, they knew that ''Donnell's title to said note was defective because the amount named was as yet not earned, and probably would never be carned because he might be unable to serve, he might be supplented or he might region from the case because of illness." The plaintiffs received the note on February 12, 1927. The brether of the defendant was an experienced lawyer and had been a very intimate friend of O'Donnell's for ever thirty years. He testified that before the date of the execution of the note he had seen O'Donnell three or four times, on each of which occasions he had talked with the latter "about the question of fees in this case," but he gave no testimony converning the health of O'Donnell during that period of time. This witness also testified that after helding: various talks with O'Donnell concerning the question of fees, that he got the defendant, on January 4, 1927, to sign the negotiable note in question. The criminal trial started on February 14, 1927, and lasted for many weeks, during which time . Donnell acted as an attorney for the defendant in that proceeding. In the light of these facts and circumstances the instant contention seems rather an idle one. Moreover, the proof of the defendant is to the effect that O'Donnell agreed that for all his services in connection with the criminal case, rendered or to be rendered by him, he was not to receive as compensation, in any event, more than the \$5,000, and the brother of the defendant, the

of the durate and twitteniter, tor they all the given for TI T P TING OR I SAI TEACHER STORE AND BORN SAI OF AN ABSTRAN cles was end therefore amain's no flows them, it is no had the char the trial outle start on the conder for three to be the technic. and the ting sold they as i repose the converte the married mer me a de monerar alla succession and les mes and land and a de mes year uneble to try the sess and units to a recover of the co. with the trade of clothe spale in all approvable of coefficient of closes. afilterial for the age of the state of the second of the second of the second of der an ner state imperental. Das und erlandin and ere bine ui es estit of the let a was a control of the terms of the stone of a language for the way to the terms of the in the community and an arm of the arms of alders -dy no agon of the plantage of the concess of the reary 12, 1927. An enclose of the orfone are a constituent with ergion werd in rectioning weed to him him the property of it beditioned All commont he had some . DesignIl ours or four times, on each of phich remoratems he and telimed with the later " new followers of feer in this again." to diled out to be empo growthed on orang of ded antigo II ander Serie period at the attention of the court of the court of the court of the w rions take with the with none come the event of the street has set the defindence on denu xy 4, loty, the start which his note in and the state of the cold of the state of th াকে বিষয়ে বিষয়ে বিষয়ে বিষয়ে বিষয়ে বিষয়ে প্রায়েশ বিষয়ে প্রায়েশ বিষয়ে প্রায়েশ পর্যায়েশে প্রায়েশে পর্যায়েশে পর the defendant in the properties in the the of he are another the - 2100 - 200 office of the reson there is a trades little of office and being and considered BONNER SERVER TO THE SERVER OF Developes la la filma de rela 1714 mario en la los estados de la fila tera de 183 de 1 real files of the contract of with the band a set of a rest but but the set had been the bank of house same town

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attorney, also testified that in the negotiations with O'Donnell he told the latter that he and the defendant wished O'Donnell to make the necessary preparations for the trial and that the latter did certain things in connection with the said preparations.

"Knowledge by an indorsee that the note was given in consideration of an executory agreement by the payee does not deprive the holder of his character as a holder in due course, if the payee fails to perform, where the holder had no knowledge of the breach prior to his acquisition of the instrument." (8 C. J. 510, and cases cited in support of the text.)

A note is not made non-negotiable because of the mere possibility of failure of consideration after it is purchased. (See Woodlawn Security Finance Corp. v. Doyle, 252 Ill. App. 68, 81, and cases cited therein.)

stances relief upon by the defendant in support of his contention that the trial court should have allowed the case to go to the jury, and we are satisfied that there is no evidence in the record tending to contradict, in any material matter, the clear prima facie case made out by the plaintiffs. The defendant relies upon the case of Foncannon v. Lewis, 327 Ill. 455, but that case presents an entirely different state of facts from the instant one.

The defendant executed the note in question upon the advice of his brother, and ttorney. The plaintiffs, bankers, took the note from O'Bennell, the payer, in good faith as collateral security for a pre-existing debt of the latter and without any notice of any infirmity in the instrument or of any defects in the title of O'Bennell. There is no evidence in the record that the defendant, after the trial of the criminal case, demanded the return of the note from O'Bennell. When the defendant received the notices from the plaintiffs demanding payment of the note he did not then inform the latter of any of the matters set up in his special pleas. He paid no attention to the notices, and on May 21, 1928, the plaintiffs were obliged to commence

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the instant proceedings to enforce payment of the note. It was not until September, 1928, that the defendant saw fit to get in touch with the plaintiffs and to inform them of the alleged agreement with O'Donnell. If the defendant's contention in the instant case were sustained, it would be unsafe for banks to deal in negotiable papers.

The judgment of the Superior Court of Gook County should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur-

the lastent procedults to calore payment of the cote. It was not until deprender, 1930, the the checket was fit to get in loads with the plaintiffs and to inform than of the alleged agreement with O'Democia. If the defendant's contention in in the case were custoffed, it would be unserful for banks to feel in accolute payers.

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ROLLIN COLEMAN, Appellee,

7.

MICHAEL WROBEL, BUILDERS BOND AND MORTGAGE COMPANY, a Corporation, et al., Defendants.

BUILDERS BOND AND MORTGAGE COMPANY, a Corporation, Appellant. 255 I.A. 622

FROM INTERLOCUTORY ORDER
OF SUPERIOR COURT OF COOK
COUNTY, APPOINTING A
RECRIVER.

MR. JUSTICE SCANLAR DELIVERED THE OPINION OF THE COURT.

The to an appeal by Builders Song and Morton a corporation, from an interlocutory order entered in the Superior Court of Cook County, appointing George W. Story receiver of certain real estate in Cook County, Illinois, which order was based upon the verified bill of complaint to foreclose a trust deed, filed by Rollin Coleman, appellee. The bill made Michael Wrobel, Builders Bond and Mortrage Company, a corporation, "Charles Penikoff, Receiver in Circuit Court Case No. B-158964," et al., defendants, and prayed that the defendants "may be required to make full, perfeet and complete answer to said bill," etc.; "that a receiver be appointed during the pendency of this suit to take and have immediate possession of said premises; that such receiver have the power and authority to operate, manage and conserve said premises, to collect the rents, issues and profits thereof and other powers of receivers in like cases; that said receivership be continued until the statutory time for redemption from the sale of said premises," and that a writ of summons in chancery be issued as to all of the defendants named in the bill. The bill elleged (inter alia) that the

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defendants, including "Charles Penikoff, Receiver in Circuit Court
Case No. B-158964," "claim some interest or lien in fee to some lesser
estate to or upon the real estate described therein, \* \* \* that the
right, title, interest and lien, if any, all said persons listed have
or may have in and to such real estate, and in the subject matter of
this suit, so held or claimed by said persons, is and are subject,
inferior and subordinate to the lien of said trust deed herein to be
foreclosed, and to the right, title, interest and lien of your orator."

Before the return day of the summons, appelles, after notice to the defendants, made a motion for the appointment of a receiver, and on August 19, 1929, the court entered the following order:

"On metion of solicitor for complainant on notice duly served on all parties in interest and it appearing that a receiver ought to be appointed to take hold of and conserve the property, the subject matter of foreclosure;

It Is Ordered that George W. Story be and he hereby is appointed as receiver in this cause with the usual powers of receivers in chancery provided that he file a bond in the sum of \$1,000.

Joseph B. David, Judge."

On August 24, 1929, the chancellor, without notice to the defendants, entered an order approving a bond of the receiver in the sum of \$500.

The appellant contends that the Circuit Court and Superior Court of Cook County are courts of concurrent and co-ordinate jurisdiction and that the chancellor of the Superior Court erred in appointing a receiver, as it appears from the allegations of the bill that the Circuit Court had already appointed a receiver for the same premises. This contention is a meritorious one.

"Then a court of competent jurisdiction has appointed a receiver, who is in possession of and administering the property under its orders, another court of co-ordinate jurisdiction will not entertain a bill to administer the same property, and to take it from the possession of the former receiver, and to appoint its own receiver. In such a case, the parties aggrieved should seek relief in the court which is already in possession of the property through its receiver. \* \* \* And the test as to priority is not to be found in the first actual, manual possession of the res, but the court which first asserts exclusive control by reason of having taken cognizance of the subjectmatter of the litigation is entitled to proceed with the

defendants, including "therise besides", Stativer in Circuit Pourt Case We. M-158966," "olaim state interest at item in fer to name interest catate to or upon the real estate described therein, " \* \* \* int the right, title, interest and lien, if any, all said porsone listed have a may intered in and to make real estate, and in said porsone listed have in say have in and to make the list of someone, is and use whilest, this said, so held at claims to the lists of orid trust dors herein to be interested, and to the right, title, interest and lists of your states. "Sefere the return dep of the statement and lists of your states."

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administration of the estate." (High on Receivers, 4th

"As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and can not be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute." (Markin v. Brundage, 276 U. 3. 36, 43.)

"All the authorities sustain the proposition that, a se when a court of equity acquires jurisdiction of a cause, and appoints a receiver to take charge of the property involved, then no other court of co-ordinate jurisdiction has any power or authority to interfere or meddle with the property in the hands of the receiver, but must leave the court appointing the receiver untrammeled in its administration of the same, as the law directs, regardless of whether the original appointment was or was not erremeous. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. For is the rule restricted in its application to cases where property has been actually seized under judicial process before a second law, 66.)

In the case of conflicting applications for the appointment of a receiver, the general rule is that the court which first takes cognizance of the controversy and thus obtains jurisdiction will retain it to the end of the litigation, and, incidentally, is entitled to take the possession or assume the control of the subject-matter of the controversy, to the exclusion of all interference from other courts of co-ordinate jurisdiction. One court, therefore, has no power to appoint a receiver for property where a receiver has already been appointed therefor by another court of competent jurisdiction, who has taken possession of the property involved; or rather, a subsequently appointed receiver will not be allowed in any manner to interfere with the rights or possession of the first. The question of precedence in such a case depends upon priority of appointment. All the second second line

Another court of co-ordinate jurisdiction has no right to interfere with property in the hands of a receiver already appointed, nor to entertain complaint against such receiver, nor attempt to control or call him to account, or undertake to remove him." (25 Am. & Eng. Enc. of Law, 2d Ed., p. 1112.)

The bill does not allege that leave was ever granted the appellee by the Circuit Court of Cook County to sue the receiver, Penikoff, or to replace him as receiver, or to extend the receivership to the instant case, and for aught that appears in the bill, the appellee may have

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edulatable time estates." (High on Receivers, Alm Ed., p. 70.)

"is between two course of concurrent and co-ordinate jurisdiction, the court which first abidises jurisdiction and constructive prescrion of property by filing the bill is emitted to relain it without interfacence and come out be deprived of its right to do as secouse it may not baye obtained order payed on prescrion or the mentry of the payed of first or a stundame. 216 U. . . 26.

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been a party to the proceedings in the Circuit Court. The appeal attempts to defend the appointment of the receiver in the instant case upon the sole ground that the bill alleges that the mortgage in the Circuit Court proceedings is junior and subordinate to appellec's. We facts are alleged in the bill that sustain this contention and the allegation that the appellee's lien is superior is merely a conclusion of the pleader, but, in any event, under the authorities, it would make no difference in the determination of the instant contention that the lien of the appellee is superior to that of the complainant in the proceedings in the Circuit Court, and if the appelles's mortgage, as a matter of fact, is extitled to priority, he should have sought relief in the Circuit Court, which court was already in actual or constructive possession of the property through its receiver. The appellee, in defense of the instant appointment, has called our attention to several cases, but none of those is in point, as each involves merely the question of the power of a court to remove a receiver appointed by it at the application of one party and to then appoint a receiver at the application of another party. The Superior Court had no power to remove the receiver appointed by the Circuit Court, and there are now two receivers of the same property, and if the instant order is sustained we would have presented an unsecoly conflict between courts of concurrent jurisdiction.

The appellant contends that it was reversible error to appoint the instant receiver without requiring the appellee to give a bond, unless it was set forth in the order that in the opinion of the court, upon notice and full hearing, the bond called for by the statute should be dispensed with, and that the order appointing the receiver is fatally defective in this regard. In the view that we have taken of the first contention it is unnecessary for us to consider the second.

The order of the Superior Court appointing George W. Story as receiver of the premises described in the bill of complaint is reversed. Barnes, P.J., and Gridley, J., concur.

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FRIEDA GOESSELE.

Appellant,

Y.

FEDERAL LIFE INSURANCE COMPANY, a corporation,

Appellee.

APPEAL FROM

CINCUIT COURT

COOK COUNTY

Opinion filed Nov. 6, 1929

UR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This was an action brought upon a policy for accident insurance issued by the Federal Life Insurance Company, upon a the life of George Goessele for \$1,000, in which the plaintiff Frieda Goessele was named as beneficiary. The policy was issued warch 9, 1935. George Goessele, named in said policy, came to his death way 15, 1937, by reason of injuries received in an accident occurring way 13, 1927. The policy of insurance, by its terms, expired warch 8, 1936. The policy of insurance, among other things, contained the following:

"By payment of a renewal registration fee of One Bollar (\$1.00) in advance, this Policy may be renewed from year to year for further periods of one year. Thereupon a receipt signed by the Secretary of the Company shall be issued to the Insured, which receipt shall be the only evidence binding upon the Company of the payment of such renewal registration fee. In such event the Policy will be continued in force to the date specified in such renewal receipt. The Company will renew this Policy for at least one year; but thereafter this Policy may be renewed only with the consent of the Company."

The policy of insurance lapsed by its terms, as already stated, and on November 17, 1926, George Goessele paid to the defendant a renewal registration fee of one dollar and received the following receipt:

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Opinion filed Nov. 6, 1929

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This was an action brought upon t coliny for noniced insurance lawned by the lederal bile insurance lampany, upon the life of decree Commons of the first 1,070, in which the vicinity fileds Commons was asset of sensitivity. The policy was issued decree 2, 1745, decreed so sensitivity, the policy count to bie decid the filed teeth they lay lay lay, by reason of injuries received in an accident occurring way lay lawn. The policy of insurance, by its terms, expired arrob 6, 1976. In colley of insurance, by among other things, contained the following:

Poller (\$1,00) in threads, this folicy and be removed from year to year for further periods of one year. It is year to year for further periods of one year. Thereupon a receipt signed by the Scorning of the Secretary of the leavest policy and recent shall be two only evidence birding upon the learnty of the pryvent of such teatest registration from the years of the policy will be continued to first to the date opening will remove this folicy will remove the recent receipt.

Company will remove this folicy for all least any year; up to therefor this Policy any be reasoned only its the company of the Company.

The policy of insurance labers by its terms, as already attacted, and an Movember 17, 1976, Decres Gospesia pild to the defendant a removal registrate a few of one deliar test recoved the fallowing restot:

## "Premium Receipt

OHICAGO TRIBUNE TRAVEL ACCIDENT INSURANCE POLICY IBSUED BY THE FEDERAL LIFE INSURANCE COMPANY

Received One Bollar \$1.00 in payment of renewal premium on Chicago Tribune Federal Life Insurance Company Travel Accident Folicy.

Issued to George Coessels; Nov. 17, 1926; Federal Life Insurance Company.

W. E. Brunden Secretary.

This payment has been recorded and is accepted subject to the conditions of the standard provisions of the policy."

Due notice of the death and the cause thereof was furnished to the defendant by the beneficiary, Frieda Goessele, plaintiff in this cause.

The only question involved is the interpretation of the clause in the policy and the receipt issued November 17, 1926.

It is contended on behalf of the defendant that the acceptance of the one dollar in payment of the renewal premium on November 17, 1936, continued and extended the policy for one year from and after the date of its expiration, by its terms, on November 8, 1935. It is contended on behalf of the plaintiff that the receipt, by its terms, extended the policy of insurance for one year from and after November 17, 1936, at which time it was paid and received by the company. The receipt does not specifically state that the policy should be continued in force until November 17, 1927, but the date on said receipt signifies that it was received and accepted as of that date. It is insisted that the legal effect is to extend the time of the original policy only for one year from its expiration.

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If the contention of the plaintiff is correct, the accident happened within one year from the period of the acceptance of the receipt and if the contention of the defendant is correct, the accident happened over one year after the termination of the renewal of the policy from March 8, 1926. It is a well recognized rule of law that courts abhor forfeitures and will construe a policy liberally in favor of the insured. It becomes necessary, however, to consider the policy of insurance and its purpose, and it appears to be plain that the rights of the parties are, necessarily, fixed by the terms of their agreement.

The original insurance granted by the policy was for the period of one year, from March 9, 1925, until and including March 8, 1926, and any rights continuing the policy, must be based upon the agreement of the parties as contained in the policy. It is provided in the policy that it may be renewed from year to year for further periods of one year, and in our opinion, the payment of the premium was effective only for the purpose of continuing the policy for the period of one year from the date of its expiration. The receipt does not specifically agree to extend the time to any specific date, and the time stated in the receipt refers only to the date of the acceptance of the renewal premium. If the interpretation should be placed upon the policy and the receipt, as asked for by the plaintiff, there would be a histus between the time of the expiration of original policy and its renewal and it would not constitute a renewal of the policy, but the making of a new agreement for a period of time not contemplated by the policy. The expression used in the policy that it may be renewed from year to year for further periods of one year, should be interpreted to mean

eccident bappened within one year from the period of the cocident bappened within one year from the period of the coceptance of the receipt and if the contention of the defendant is correct, the accident bappened over one year after the termination of the rea. I of the policy from farch 8, 1926. It is a sell recognized rule of law that courts abnor forfeitures and will construe a policy liberally in fevor of the insurence mesessery, however, to consider the policy of insurence and its purpose, and it appears to be plain that the rights of the parties are, accountily, fixed by the terms of their agreement.

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\*renewed from year to year for periods of one year\* from and after the date of the expiration of the policy.

In our interpretation of the policy and the receipt,

the payment of the one dollar served only to continue the

policy for the balance of the year following the expiration

of the original contract of insurance and effected the keeping of
the policy in force up to and including March 8, 1927.

For the reasons stated in this ofinion the judgment of the Circuit Court is affirmed.

JUDGHERR AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

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in our interpretation of the policy and the receipt,
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RYSER AND HOLDON, SA. CURC. .

33389

FRIEDA GOESSELLE.

(Plaintiff) Appellant,

V.

FEDERAL LIFE INSURANCE COMPANY, a Corporation,

(Defendant) Appellee.

2551.A. 6223

APPEAL FROM

GIRCUIT COURT,

GOOK COURTY.

Opinion filed Jan. 2, 1930

## OPINION ON REHEARING .

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

After reconsideration of said cause, upon rehearing on petition and answer thereto, this court adheres to its original judgment entered in said cause in this court and the opinion heretofore filed is ordered to stand as the opinion in the cause.

RYNER AND HOLDOM, JJ. CONCUR.

ROSES

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ANTERESTO AGRICA

(Plaintiff) Aspellant,

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PEDRIAL LISE ISBURGED COLUMN.

(Befordent) Appellac.

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COOK COURTY.

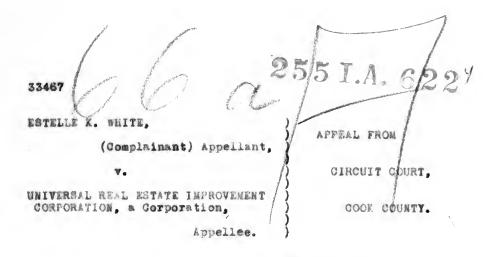
Opinion filed Jan. 2, 1930

## . 9518ANDE OF NEWASSIES

MR. PERMIDING JUSTICE VILLUE desivered the apinion of the court.

After resonalderation of said sause, upon redearing on polition and snaver therein, this court address to lie original judgment entered in eald cause in this court and the opinion beer tofore filed in ordered to stand as the opinion in the pulse.

KYRKA AKO HOLBOH, JJ. DORGUP.



Opinion filed Jan. 2, 1930

MR. PRESIBING JUSTICE WILSON delivered the opinion of the court.

The complainant Estelle K. White filed her bill of complaint in the Circuit Court of Cook County against the defendant Universal Real Estate Improvement Corporation, a corporation. The defendant interposed its demurrer to said bill and the demurrer was confessed and leave granted complainant to file an amended bill. Movember 13, 1928, general and special demurrers filed by the defendant to an amended bill of complaint were sustained and complainant, electing to stand by her amended bill, it was dismissed for want of equity at complainant's costs. Complainant prayed and was allowed an appeal to this court.

The amended bill charges that the complainant on the first day of October, 1925, entered into a written contract with the defendant Universal Real Estate Improvement Corporation, under which plaintiff agreed to purchase a certain lot in Pater's Harborview Subdivision; charges further that at the time she was engaged in the business of selling merchandise at retail in a store in the City of Chicago, and while there and prior to the signing of the contract in question, she was solicited by the agents of the defendant for the purpose of

33487

COTELLE X. VELTE.

(Instrugga (Insulations)

THE FEBRUARY OF A PATE LAPROVENCE :

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Opinion filed Jan. 2, 1930

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The complaint filles of court of Cool county explaint to a defendant in the direct court of Cool county explaint to a defendant in the direct factor (more executed to a continue to a lider corporation). The defendant landsqueed its negation to a lider the countrer was confessed and leave printed corpliant to file an exected till. Movement if, 1878, printed corpliant demarks flied by the defendant to an execute till of some filles to an execute of corpliant pare victained and compliants. Clerking to stand on any compliants. Clerking to stand on the same tilling to stand on the confidence of country at confidence is a confidence to the confidence of country at confidence of country.

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procuring her as a purchaser for the lot in question; charges that complainant had no knowledge, nor means of securing knowledge of real estate values in said subdivision, which was located in Chicago, except in so far as said values were told to her by the owners of said subdivision; charges that the defendant, by its agents, represented that lands in the vicinity of said subdivision, and more particularly the lands in the subdivision in question, were increasing in value and that lots in said subdivision were being re-sold by the purchasers thereof for large profits and that she would make money on her investment; charges that she relied upon said representations, went to the property owned by the defendant, in company with the agents, and there met other representatives of the defendant who made like statements; charges that the defendant, among other things, represented to complainant that the owners of the subdivision had adopted a comprehensive program for developments and improvements; that a number of bungalows would be under construction shortly; that a school building would be built; a church constructed; streets extended through and across said subdivision; that alleys were being laid out and sidewalks being built; that underground improvements were then being constructed; that special assessments had been levied, payable in the year 1926, and subsequent thereto, for the payment of improvements; that each and all of the improvements and developments, as represented, were part of the program to be completed on or before a certain time in the future; that advertisements were inserted in the newspapers which were read by the complainant and believed and relied upon by her; that each and all representations so made were false and were known to be false at the time and were made to deceive complainant for the purpose of inducing her buy the lot in question; that all of said representations were material and relied upon by complainant.

procuring her as a purchaser for the lot in question; charges that completent had no knowledge, nor means of securing knowledge of real estate values in axid subdivision, which was located in Chicago, except in so for as said values were told to her by the owners of said subdivision; charges that the defendant, by its agents, represented that lands in the vicinity of said subdivision, and more particularly the lands in the subdivision in question, were increasing in value and that lots in said subdivision were being re-wold by the purchasers the real for ideas printer and there are would make mency on her investment; charges that she relied upon said representations, ment to the property owned by the defendant, in sompany with the agents, and there met other representatives of the Cefendant who made like atatements; charges that the defendant, among other thlags, represented to complainent that the orders of the subdivision and adopted a comprehensive program for developments and improvements; that a number of bungalows would be under construction shortly; that a sencel building would be built; a church constructed; streets ertended through and across sold subdivision; that alleys sere being and ent and sidewalks being built; that undergranal improvements were them being constructed; that special nessenses had been levied, payable in the year lewis, and subsequent thereto, for the payment of improvences; that sook and all of the improvements and developments, as represented, were part of the progress to be completed on or before a certain that in the fatore; thet bear seem drive brongereen and al besteement ares seinementsteement by the complainant and believed and relied upor by her; that and all representations so ands more false the vert known to? threisings or the time and were made or december only all the sale! see of he fir teds incitation of rol out and red galorbal to execute ads esta representations were auterial and relied upon by completant.

The amended bill further charges that, upon a signing of the agreement, plaintiff made her initial payment in cash and thereafter made payments from time to time until September 12, 1927; charges further that on to-wit the first day of April, 1926, she ascertained that said owners of said subdivision had not complied with the representations made, but that on the contrary, all of said lots in said subdivision were unimproved and unoccupied; charges that she then endeavored to communicate with the agents of the owners of said subdivision in order to request them to cancel her contract, but that they avoided her and put her off from time to time and that on the 7th day of October, 1927, she filed her suit; charges that by reason of said misrepresentations she has sustained damages, in that said property has not increased in value, and asks that the contract may be declared invalid and void and an accounting taken as to the amount paid by said complainant under said agreement and that she might have such other and further relief as equity might require.

The contract contained a provision stating that it was for the sale of vacant property only and the vendor became in no manner obligated to resell for the benefit of the purchaser. The contract also contained a provision stating that the purchaser had read and understood the contract and agreed that no representations, promises or agreement not expressed therein had been made for the purpose of inducing the purchaser to enter into and execute it.

A reading of the bill of complaint shows that the allegations as to the time in which the work, as represented, was to be completed was within a period of six months after the date of the making of the agreement. An examination of the record of payments shows that the complainant continued to make

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payments on the property for a persod of two years, after it came to her knowledge that the improvements were not undertaken.

It becomes the duty of one asking for a rescission of a contract on the ground that it was obtained by fraud, to rescind at the earliest opportunity. A vendee purchasing real estate can not wait for a period of two years before asking for rescission of a contract on the ground that it had been obtained by fraud.

The bill does not contain sufficient allegations of fact, from which it can be claimed that the delay was without fault on the part of the vendee. She had no right to speculate upon the probability of an increase in value for the length of time shown on the face of the bill.

See <u>Huiller</u> v. <u>Ryan</u>, 306 Ill. 88, wherein the court says:

"It is equally necessary that a party to a contract desiring to rescind it for fraud must make his election to do so promptly after learning of the fraud. He must announce his purpose and adhere to it. (Greenwood v. Fenn. 136 Ill. 146; Hansen v. Gavin, supra.) This conveyance was made on July 19, 1920, and the bill was filed more than eighteen months later, to the May term, 1923, of the court."

It does not appear that the complainant relied upon the representations of the agents of the defendant. It is alleged in the bill that plaintiff went to the property in question, and was able to see the conditions surrounding the subdivision and ascertain what, if anything in the way of improvements, was being done upon the property. The Supreme Court in this State in the case of Johnson v. Miller, 299 Ill. 276, in its opinion says:

"Appellant did not depend, as we have said, on representations of Miller but visited and examined the land. Quite a period of time before the deeds

payments on the property for a parked of two years, after it down to box knowledge that the tarrestence vir not underliken.

it because the dety of one acting for a recitation of a contract on the ground that it was obvioused by fraud, to received at the the cartisest opportunity. A vendee variousing real retails on the first of the period of the period of the formal that it had been abtained by trans.

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were exchanged he had the opportunity to ascertain the character and value of the land and the truth of any statements or representations on that subject, if any such had been made. It seems clear from the testimony that he was not defrauded or misled by false representations made by anyone as to the value He had the opportunity by his visit of the land. to the farm to ascertain and determine its value, and it was his duty to make use of such opportunity. The law charges him with knowledge he might have obtained by making use of the means afforded him. no deceit has been practiced which ordinary pradence could not detect, the law will not assist a man capable of taking care of his own interests because he makes a bad or losing bargain. It is only in cases where the parties have not equal knowledge or means of knowledge as to the value of a property that equity will afford relief on the ground of fraud and misrepresentations. Representations as to value of property, though exaggerated, do not ordinarily afford ground for setting aside a contract, and are never made the basis for relief where the party claiming to have been deceived had ample opportunity to know of the truth or the faltity of the representations. If they are made with the intention of procuring them to be acted upon without investigating their correctness, and a party does so rely on them and act, equity may afford relief."

Complainant had no right to rely upon the representations that special assessments had been levisd for the purpose of paying for the improvements to be made in said subdivision. This fact was easily ascertainable from an examination of the records of Cook County, in which county the property was situated and in which county complainant resided. Morel v. Masslaki, 333 Ill.41.

Counsel for defendant rely upon the fact that underground improvements were being made and, in their brief, state that it was so represented to complainant that such underground improvements, namely, water, electric light, and telephone cabbes were all in. The bill, however, does not charge such fact in this language, but charges that the underground improvements were then being constructed in and through said subdivision and would be completed within six months from that date. If, as a matter of fact, they were then being constructed, complainant while upon the premises could have investigaged and ascertained the truth or

reis ambanged he had the opportunity to ascertain the observator and value of the lend and the truth of any statements or tappementations on that subject, ads more rable amose st if any wash bad been ande. testinony ties he was not descauded or stell of by false representations sade by anyone as to the value Tiely aid to thing trapp set had sk of the Land. to the form to aspertuix and activities its walus, and it was bis duty to make use of each appartunity. -do ared idain as egualabas dire est organia est adi 沙世母母 . tuined by unling use of the mouse efforted bim. no discit has been practiced which ordinary need and flacing could not detect, the law will not agrict a man capable of taking care of his era interests because he cokes a bad or losing bargeia. It is haly to care electes of the care of the c of enouledge as to one value of a property that sourly -ercerein har herry to hence out no totler brotte filty analations. Representations as to value of passary, though exagnerated, do not ordinarily afford ground for setting reids to contract, and are never and the the basic for relief chere the party claiming to been decreed and sepic cryportully to the of the truth or the faikity of the supresentations. If they are ande with the intention of gramming than to te coted upon nishous investigating their correctes and a party does to reit on them and not, equity any afford relief."

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falsity of this representation. Almost without exception, the representations alleged by the bill of complaint to have been made, were as to things that were to be done in the future, and not as to material existing facts. Bay v. Fort Scott Investment Oo. 153 Ill. 293. The parties dealt at arm's length, and there was no fiduciary relationship existing on the part of the vendor toward the vendee. The rule of caveat emptor applies to the purchase of real estate, as well as to any other commodity where the parties deal at arm's length. Van Gundy v. Steele, 261 Ill. 206.

The contract in question was not a void contract, but voidable, and it became the duty of the vendee to repudiate and ask for a rescission promptly after discovering the fraud. The vendee in the present case, by her action in continuing payment for two years after the discovery of the alleged fraud, is not in a position to ask for the interposition of a court of equity. It became her duty to elect promptly, either to abide by the contract, or to ask for a rescission. Naugle v. Yerkes.

187 Ill. 358; Brown v. Brown, 142 Ill. 409.

From a reading of the bill, we are of the opinion that it failed to state on its face a cause of action and is demurrable.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDON, JJ. CONCUR.

falsity of this reprosentation. Almost without exception, the representations alloyed by the bill of complete to day over each and a representation the first which is the false and the set of the days in the false and the set of the set of the set of the representation of the set of the set of the set of the vendor the vendor. The role of cavest expert the set of the vendor the vendor, the role of cavest expert the set of the vendor parties of the vendor the parties dash at arm, is and the parties dash at arm, and the set of the parties dash at arm, and the vendor.

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NELLIE CERRIGAE AND MARTIN CORRIGAN.

Appeilees,

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EDWARD L. ENGLAND, et al,

Defendanta.

On appeal of EDWARD L. ENGLAND,

Appellant.

APPEAL FROM
MUNICIPAL GOURT
OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiffs, Nellie Corrigan and Martin Corrigan, brought their action in the Municipal Court of Chicago against Edward L. England and Bruce B. Barney, for damages sustained by reason of a breach of contract dated July 15, 1924, the contract in question being for the purchase of a certain piece of real estate located at Willow Springs, Illinois. The defendant, England, filed his affidavit of merits in which he denied that he was a partner of the said Barney, but alleged that he had employed the said Barney under a written contract to secure purchasers for property located at Willow Springs, Illinois; that if the terms were satisfactory he would personally enter into a contract for the sale; denied that he had received any money from the plaintiffs and that the plaintiffs had failed to pay the real estate taxes on the property involved during the years 1924, 1925, 1926 and 1927.

The cause was tried before the court without a jury, resulting in a finding by the court in favor of the plaintiffs and against the defendants, and assessing plaintiffs' damages at the sum of \$165.00 and judgment upon the finding.

Opinion filed Jen. 2, 1930

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The defendants in September, 1923, entered into articles of partnership for the purpose of carrying on a business of buying, selling, renting and managing real estate under the firm name of Bruce 8. Barney & Company. The facts show that an account was opened by the partnership with the Enthonal Bank of the Republic in the name of Bruce B. Barney & Company. Offices were maintained at 29 South La Salle Street, and the name of the partnership was upon the door of the office where the business was carried on.

Defendant testified that shortly after the formation of the partnership he had a talk with Barney in which he declared that the partnership was ended. The partnership agreement itself provided that either partner would have the right to dissolve the partnership by giving thirty (30) days notice in writing. There does not appear to have been any written notice given. Barney testified that there was no conversation between himself and England in which England stated that the partnership was to be terminated.

A contract for the sale of a piece of real estate owned by England at Willow Springs was entered into between the Corrigans and Edward England by Bruce B. Barney, his attorney in fact. The original payment of \$50.00 was made July 15, 1934, and \$10.00 every month thereafter until June 11, 1925, except March 10th, 1925, when \$15.00 was paid. During this period of time the total sum of \$165.00 had been paid.

Nellie Corrigan testified that she called upon the defendant, England, at his place of business in July, 1925, and asked England if he would take the payment due because she could not find Mr. Barney, and was told by England that he had nothing to do with the contract.

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It is insisted on behalf of the defendant, that there was no proof showing that Barney was authorized in writing to sign the contract in question on behalf of the defendant, England; that the finding of the trial court was not supported by the evidence; that the finding and judgment is against the manifest weight of the evidence.

The amount of the finding and judgment appears to be the exact amount of money paid in by the plaintiffs as installments on the purchase price of the property in question. The partnership arrangement between the defendants, if in full force and effect when these payments were made, was sufficient for the purpose of showing that the money had been received by the partnership and, if so received, Barney and England, would be liable as partners for money had and received. This is particularly true upon the refusal to acopet further payments under the terms of the agreement.

sustained by reason of the breach of contract, it is apparent that substantial justice has been done by the judgment of the trial court if the money was, in fact, received by the partnership. The question as to whether or not the partnership was dissolved prior to the acceptance of the payments, was one of fact for the court. If, as a matter of fact, England entered into a partnership agreement and placed Barney in a position where he could accept payments of money in and about the partnership business, England should be required to suffer the consequences rather than a person dealing with Barney, believing that Barney had such right and authority.

The court saw and heard the witnesses, and his finding will not be disturbed unless against the manifest weight of the

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evidence, and we are not inclined to say that it was after a reading of the testimony in the case.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

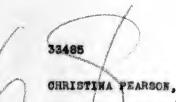
JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

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Appellee,

APPEAL FROM

MUNICIPAL COURT OF CHICAGO.

RIDGEWOOD CENETERY COMPANY. Appellant.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiff Christina Pearson in her statement of claim, filed in the Municipal court October 4, 1928, charged that on April 25, 1924, she entered into a certain contract in writing with the defendant for the purchase by her of two cemetery lots from the defendant, Ridgewood Cemetery Company, for the sum of \$1,000.00. The contract was in writing and contained the following provision:

"These lots are sold with the guarantee they will double in value in twenty-four months or this contract is null and void and all moneys refunded.

Charges further that plaintiff complied with all the terms and provisions of the contract, including the payment to the defendant of the purchase price; charges further that the said lots did not double in value in accordance with the guarantee made by the defendant and its agents: charges further that she has demanded a refund of the money peid by her under the contract, which has been refused.

The affidavit of merits filed in defense, charges that the plaintiff accepted a deed to the property and did

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CHRISTINA PERHOCE,

Appellen,

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Opinion filed Jan. 2, 1930

MR. of the court.

Plaintiff Christian bearson in her et coment of claim, filed in the contact court Cotober 4, 1828, charged that on the Fir FG, 1834, che entered into a certain contact in writio: att the defeniont for the director by her of two centery love from the fermions of Constany Company.

for the run of L.W. C. The contract of a criting and contained the following provision:

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not, prior to the commencement of the suit, make any tender to
the defendant of the deed or other reconveyance of said lot;
the defendant of the deed or other reconveyance of said lot;
the charges further that within twenty-four months after the date
of the contract that the said lots did, in fact, double in value.

The cause came on for hearing before the court without a jury and a finding was entered in favor of the plaintiff, assessing her damages at the sum of \$2,200.00, and judgment was entered upon the finding. From this judgment this appeal is taken.

from the testimony it appears that the plaintiff paid the sum of \$1,000.00 in full for the lots in question, as provided for in the contract. The last and final installment was made in January, 1936, which was less than two years after the making of the contract.

It is insisted on behalf of the defendant that, THE F TO SER OF CR SULFAMENTS A SER OF THE by accepting her deed in full, she waived any rights under the contract. Defendant argues that, in order that plaintiff of the same with the same of t might be able to maintain an action under the contract, she should allege and prove rescission and notice to defendant to the state of th within a reasonable time after the cause of rescission arose and became known to the plaintiff. With this we cannot agree. Moreover, plaintiff on July 5, 1928, offered to return to the defendant the lots in Question together with the deeds and contracts appertaining thereto, which was refused. She could do no 

she was entitled, under the terms of the agreement, to wait until the expiration of the twenty-four months. And, in fact, an election by her to resoind before that time would have been premature. Moreover, she was not required to resort to equity in order to exercise any right of rescission, but was entitled

not, pries to the commencement of the suit, make any bander to the the defendant of the feed or other reconveyance of sold lot; charges further that within twenty-room meaths "test the deve of the centract that the esta lote old, in fact, double in value.

The ceu c ceus on for hearing before the court situant a jury and a finding was entered in favor of the plaintiff, assessing her decages at the sum of 12,200.00, and judgment was selected upon the fincing. From this judgment this eposel is taken.

From the testimony it expects the plaintiff paid the sum of 21,000.00 in full for the loss in question, as provided for in the contract. The last and final instellment was made in January, 1888, which was less than two years after the maring of the contract.

by accepting her deed in full, she velved in richts under the contract. Setendant ergues that, is order that claimit? Also contract, setiming the contract, she contract, she alight be able to maintain in action under the contract, she that allege and prove recoiredos on notice to defendant within a remonsile time after the C use of recoired and became known to the plainilf. With this set a cot agree to the star down to the plainilf. With this set a cot agree to the defend to return to the defendant the lote in quention together its the freds and some defendant the lote in quention together. One could do coul

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to maintain an action at law on the contract for breach of guaranty. Having a right to an action at law, she could bring her action at any time within the statutory period of limitations.

There was some evidence in the record, as shown by her testimony, from which the court could conclude that the lots in question had not doubled in value and, as it was a trial before the court without a jury, every intendment should be indulged in favor of the finding. The judgment entered in the cause, however, based on the finding of the court, appears to have been on the theory that she was entitled to twice the amount of the sum paid for the lots.

From a reading of the guarantee, it appears that she would be entitled only to the return of her money, together with such interest as may have accrued thereon from the date of the final payment until the entry of judgment. The statement of claim filed in the cause charges that the defendant refused to refund the money paid by plaintiff and there is nothing contained in said statement demanding more than that amount in damages.

A proper judgment in said cause would be for \$1,145.00, same being for principal and interest at the rate of five per cent to date. The judgment of the Municipal Court is reversed and judgment entered here for the plaintiff for \$1,145.00.

JUDGMENT REVERSED AND JUDGMENT HERE FOR \$1,145.00.

RYNER AND HOLDOM, JJ. CONCUR.

to meintein an notion at law on the contract for broads of guerenty. Having a right to an action at law, she could bring her action at any time within the statutory parted of ilmitations.

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A proper judyon at in out cause won . he for \$1,146.00, see a being for or activities at five per cent no dolor. The judgment of the Sunicity. Court is reversed and judgment estarch here for the plink!!

FROM STORMSTEELS, SELECTION, SELECTION,

RYEST AND HOLDER, JU. CONCUR.

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PROPLE OF THE STATE OF IL INOIS,

(Plaintiff) Defendant in Error,

PAUL STITHIKY,

(Defendant) Plaintiff in Error.

KRROR TO

MUNICIPAL COURT,

OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

on a charge of driving an automobile on a public highway in the City of Chicago while drunk or intoxicated, in violation of the Illinois Motor Vehicle Act. The cause was tried before the court without a jury, resulting in a finding of guilty, as charged. Judgment was entered on the finding and the defendant sentenced to thirty days in the House of Correction and to pay a fine of \$50.00 and costs. From this judgment a writ of error was presented to this court.

From the evidence it appears that about seven o'clock in the evening of February 14, 1928, one wary winker and her husband, were driving a Ford car north along wentworth avenue on the east side of the street; that the defendant was driving a wash car south on wentworth avenue which collided with the Ford car; that after striking the car in which the complaining witness was riding, defendant's car swerved to the east ran over a sidewalk and ran through the front of and almost entirely within a bakery located on wentworth avenue.

The only question urged for reversal is that the judgment is not supported by the evidence.

The complaining witness testified that she saw the

SSECE

STORILL OF THE SPACE OF ILLINOIS.

(Plaintiff) Dofendant in Error,

PANL STITKING.

(Defundant) Plaintiff in Error.

SERBOR TO OCCUPT.

Opinion filed Jan. 2, 1930

The court.

The defendant faul Stituity was arrested and bried on a charge of diving an automobile on a public highest in the City of Chicago while drunk or intersidated, in vicinition of the lilinois noter Vehicle act. The class was tried before the court without a jury, resulting in a finding of guilty, as charged. Judgment was entered on the finding and upe defendant contented to thirty may a in the incuse of Correction and to pay a fine of 662.30 and meats. From this jurgment and to pay a fine of 662.30 and meats.

From the evening of february 1s, 1322, one cary inter and her hundrand, more driving a first dear acress along sentential avenue on the coat aide of the street; that the defendant was driving a ford the court pour south on sentents over the which solided with the ford car; that exter striking the our in which the coat in this after striking the car in which the completining situes riding, defendant's not asserted to the cast for very status and ran through the front of ant timest retirely within a bakery located on tenteral account.

The only question urged for reversel is the the judgment is not supported by the evidence.

The complaining mitness techniques that the complaining

oar of the defendant coming from the north along wentworth avenue and that it was zigzaging from one side to the other; that it ran over on to the east side of the street upon which they (the complaining witness and her husband) were driving; that, in her opinion, defendant's car was proceeding at a rate of from 40 to 45 miles an hour.

Six witnesses testified that the defendant was drunk at the time of the accident; that they could smell liquor upon his breath and that his manner and conduct indicated a condition of intexication.

The defendant denied that he was intexicated, and in this he was supported by his brother-in-law, who was present at the time. Three other witnesses testified as to his previous good habits as to sobriety.

The trial court had an opportunity of seeing and hearing the witnesses and observing their demeanor while upon the witness stand. Under the circumstances, we are not inclined to interfere with his finding and judgment. The same effect is given to the finding of a court as would be given to the verdict of a jury. This court will not set aside a verdict unless it is clearly apparent from the record that there was a reasonable doubt of the defendant's guilt. The People v. Nowicki, 330 Ill. 381. There is ample evidence in the testimony from which the court could have arrived at its judgment and we see no reason to disturn it.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

our of the defendant coming from the morth siong Controls around and that is san rigraging from one side to the other; that it ran over on to the east side of the street upon which they (the complaining mitreus and her buckend) were driving; that, in her opinion, defendant's our was proceeding at rate of from 40 to miles on hear.

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For the reasons stated in this opinion, the judgment of the maiotype. Fourt is affirmed.

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AUBURY CHICAGO COMPANY,

Appellee

MERCHANTS & MANUFACTURERS SECURITIES COMPANY, & COTP.

Appellant.

APPEAL FROM

SPERIOR COURT.

COOK COUNTY.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The facts involved in this appeal were stipulated by counsel. The jury was waived and the cause was submitted to the trial court. Judgment was entered in favor of the plaintiff.

From the facts it appears that the Auburn "hicago Company, plaintiff, sold to G. R. Schuster, doing business as the Clark Motor Sales Company, two Auburn automobiles receiving in apayment two checks signed by Schuster, totaling the sum of \$2,634.19. These checks were deposited by plaintiff in its bank and were later returned on account of insufficient funds. In the meantime the defendant, Merchants & Manufacturers Securities Company, a corporation, through its manager, examined the automobiles while upon the showroom floor of Schuster and paid him the sum of \$2,518.00, and received in exchange two chattel mortgage notes and two chattel mortgages covering the machines in question. Thereafter Schuster absconded and the defendant, in accordance with the terms of its mortgages, repossessed itself of said automobiles in a replevin suit. Thereafter the defendant brought this suit in trover to recover the value of the cars.

Haintel

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PRESENT OFFICERS CONTRACT.

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Opinion filed Jan. 2, 1930

WP. PRESIDERS FOTTER WILDCE desirered the opinion of the sours.

The facts involved in this court was religiously to the court the just was religiously to the trial court. Asigness was extered in favor of the plaints.

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We are also asked to dismiss the appeal on the ground that the bill of exceptions filed herein does not contain a certificate of the trial judge that it contained all the evidence heard upon the trial.

At the end of the testimony there is a statement by the court reporter that this was all of the evidence in the case, both on the part of the plaintiff and the defendant. Following this statement appears the words, "Approved this April 12, 1929. Walter P. Steffen, Judge." This is not the way in which a certification should be made, but it has been recognized as sufficient by the Supreme Court of this state in the case of Grand Lodge A. O. U. W. v. Ehlman, 246 Ill. 555. The court in its opinion, says:

"This certificate is informal, but in approving and signing the statement and certificate that the evidence was heard in the cause and was all the evidence offered, the judge did everything that was essential to preserve the evidence as a part of the record;"

The same situation as appears in the case sited, appears also in the case at bar.

As a general proposition it may be said with reference to the main point involved that, where a sale of personal property is made, by reason of false representations of the purchaser, or where a sale is made and the purchaser has no There is but one question involved in the prosecting and that is whether or not the Auburn Chicago Company, the seller, had the right to rectain the organity in the hands of an immosent third party, where the psyment had been unde by obsche, which were subwequently dishenored, on the theory that the the dishenered shocks were only a conditional payment and that title had not paymed.

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As a general proposition it may be said also refere or the sain polaries of property la Lede, by reason of false to resonantions of the purchaser, or where a sale is made and the corobinar has no

intention of paying for the same, the same is voidable, and not void, and an innocent purchaser for value acquires good title.

Reid, Nurdock & Co. v. Sheffy, 99 Ill. App. 189; Stock Yard Co.

v. Mallory, etc. Co., 187 Ill. 554; Young, et al. v. Bradley, et al. 68 Ill. 553.

Without doubt, where goods are purchased fraudulently with no intention to pay for same, the seller has the right to retake, providing no intervening rights have attached. This is true both under the common law and the Uniform Sales Act.

Chapter 131a, Para. 37, sec. 24, Cahill's Illinois Revised Statutes, provides as follows:

"Where the seller of goods has a voidable title thereto; but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title."

Faragraph 56, Section 53, of the same Act, providing for remedies of an unpaid seller, applies to the rights of the parties as between themselves. This section gives the seller the fight to retake and to have a lien under the conditions enumerated in said section, but it does not contemplate a situation where the rights of a bons fide purchaser for value have intervened. Neither do we consider this a conditional sale within the meaning of the Uniform Sales Act, as there was no contractual arrangement between the parties that it was to be such, nor does it come within the classification enumerated.

So far as this record discloses, this was not the first sale of the plaintiff to Schuster, but it appears that they had had several transactions prior to the action in question.

insention of paging for the same, the same is voidable, and not void, and sat troopens purchaser for value accurres good title. Sele, anricos & Co. v. Sheffy, 88 III. App. 188; elsok vordella.

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Paragraph 36, Section 55, of the case Act, providing for recedes of an unpaid sclier, applies to the rights of the parties as between thomseives. Into westion gives the sciier the right to retake and to have a lien under the actions of a last if does not convergate a situation where the rights of a bone file purchase for value have intervened. Actaber on we densifier this a conditional sale within the meaning of the uniform that this a conditional sale within the meaning of the uniform that this a conditional sale contractual arrangement between the vertices that it can be not the second to the chart that the constant and contractual arrangement to the second contractual arrangement to the second contractual arrangement to the second contractual arrangement that the closefication opened to be

So far an this record discloses, this was not the first and male of the plaintiff to Schuster, but it soperas that they had had several transactions prior to the sector in question.

The goods were delivered to Schuster by the plaintiff and placed in his showroom, and he was thereby clothed with all the indicis of ownership. It is a well regognized principle that, where one party places it in the power of an other to commit a wrong, he shall not be heard to complain thereafter.

For the reasons stated in this opinion, the judgment of the Superior Court is reversed and judgment entered here for the defendant.

JUDGMENT REVERSED AND JUDGMENT HERE FOR DEFENDANT.

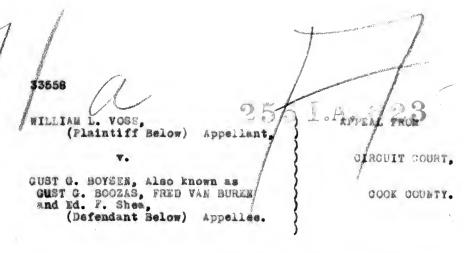
RYNER AND HOLDOM, J. J. CONCUR.

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Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

William L. Voss, plaintiff, brought his action in forcible detainer to recover possession of certain premises known as 176 East 154 Street, Harvey, Illinois. The action was directed against Gus. G. Boysen, the lessee, and Fred Van Buren, a sub-tenant under the lessee. The lease contained a provision to the effect that the lessee would not permit the premises to be used for any unlawful purpose, nor allow gambling to be carried on upon the premises. The first floor of the building contained a restaurant and pool room and it is insisted that the gambling was carried on in the basement underneath. Plaintiff was in the habit of delivering groceries and meat to the restaurant operated on the first floor.

Robert L. Gross, a witness called on behalf of plaintiff, testified that he had been in the basement several times and played blackjack there on July 30, 1938. He testified further that he was the agent for the plaintiff and handled his real estate transactions.

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Opinion filed Jan. 2, 1930

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plaintiff, testilled the tree bods in the bose or afficient plaintiff, testilled the tree bods in the bose or are restricted bisson and act of the bose or the contract for the first are well action to the contract for the tree action are the state.

E. J. Harris, chief of police of Harvey, testified that on December 1, 1938, he arrested a man there for running a game and that he saw cards, and also observed people putting money in a slot and others purchasing chips.

Arthur L. Mock testified that he had visited the pool room in the basement of the premises in question in September 1927, and until October 15, 1938, and that he was there on December 5, 1928, and that there were poker tables and that he bet on the horses and played blackjack. The witness fixed the date as of December 5th, because of the fact that it was the day of the raid. The previous witness, Harris, had fixed the date of the raid as December 18t.

John L. Ott testified on behalf of the plaintiff, that he served a formal notice upon the defendants, by which the plaintiff elected to terminate the lease.

George Goodman testified that he had been in the basement practically every day of the summer of 1928, and that the last time he was there was in October of that year and that there was a blackjack dealer and sheets on the wall with the names of horses and the race numbers and a cage where bets were accepted.

R. P. Wilson testified that he was in the place in September and that there was betting on the horse races.

Oust G. Boysen, a defendant, testified that he was
the lessee and that the landlord had tried to buy up his lease
and at the time stated that he, the landlord, did not know
whether it would be cheaper to throw him out or buy him out.
He testified further that his own place of business was on the
same street as the leased premises and that he visited said

2. J. Horris, objet of police of strey, testified that on because I. 1286, he errored a man their lor remaing a game and that he see seeds, and also observed people putting soney in a sistent outers jureleaing chips.

AFRIT L. Park inviting that he had visited the pool roun in the breakens of the premier in succion in September 1327, and quail Scapber in, 1300, and that he a start on operat 5, 1328, and that they were pour tester and that has no bet on the berees and dered bisabless. Its stiness fixed the days of the raid. The previous stress, that that fixed the date of the raid to previous stress, that the fixed the date of the raid to previous stress, that the fixed the date of the raid to previous stress, that the

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premises and saw some men playing runmy, but there were no race display sheets on the wall and no booths for cashiers to receive money on bets nor was there any blackjack played nor gambling.

Fred Van Buren teatified on behalf of the defendant that he had a sub-lease to part of the premises and ran a pool room and cigar store and, in addition, sold soft drinks. That in the front part of the basement there was some lumber and some partitions piled up. That there was a man who rented the basement for the month of November; that he knew the witnesses block and Wilson; that they did not come into the basement frequently; that there was no gambling in the basement; that boys sometimes shot graps in the basement. The witness stated further that there were from 75 to 100 people in the pool room and that the premises were large enough to contain eight tables.

William Kahlor, a witness called on behalf of defendants, testified that the plaintiff in 1926, asked him to talk with Boysen, to find out how much he would take for his lease.

Mike Prospero, a witness on behalf of the defendants, testified that the plaintiff told him that he wanted to break a lease and said he would give the witness, or anybody else, \$200 or \$300 to go upon the premises and buy a drink of whiskey, and that he replied that they did not sell whiskey on the premises. He testified further that he was in the basement mearly every day in October, but did not see any betting on races, nor did he see any blackjack played; nor were there any orap tables or gambling.

Lewis Burkett, called as a witness by the plaintiff in rebuttal, testified that in Hovember, 1928, he worked in the

premises and saw some man playing runar, but there were no race display sheets on the wall and no booths for enablers to receive money on tets nor the there may black pack played nor gambling.

Fred Von Muren toutified on behalf of the defendant

that he had a sub-lesse to part of the presiess and ran a cool room and oight store are and, in addition, soid soft drines. That in the front part of the basesant there are some imper and some partitions oiled up. That there are a sen who rented the basesant for the month of Movember; that he knew the mitnesses work and Mileon; that they did not come into the hameent fragmently; that they are and grabiley in the research that boys sometimes and error are no grabiley in the research; that for that there are true as proposed in the research that further that there are true as in the constaint that for the street and the frequently of the situes are true and the content of the significant and there has the premises are large anongs to content signification.

Villiam Anhlor, a strange called on behalf of defendants, testified that the plaintiff in 1986, sered him to talk with Boysen, to find our now cuch he would take for his lease.

bike Prospers, a mitueus on behelf of the defendants, testified that the plaintiff told him that he wanted to provide a lease and shad and sold he sould give the sitness, or enybedy slam, \$200 er 1500 to go upon the presides and out after of chiefe, and that he replied that they did not sell salakes on the presides. He testified fortest what he was in the lossest nearly every day in October, but did not eed any betting on recess, nor did he eed any biaction played; nor sere there cany capites that payed; nor sere there cany cap the or gambling.

leris durkett, called es a witness by the plaintif in robattal, testified that in sevener, 1985, he worked in ter-

basement under Van Suren's pool room and that he saw Van Buren there nearly every day and that he, the witness, at the time was dealing blackjack and that there was a book for horse races.

Gus Piazza, a witness called on behalf of the plaintiff in rebuttal, stated that he knew Van Buren; that he, the witness, was in charge of the basement in November, 1928, and was running a book, taking bets on horse races; that he had an arrangement with Van Buren, by which Van Buren was to get one-fifth of the profits of the business for the rent of the premises.

The trial court in suzming up the facts in this case, found that the plaintiff had accepted the rent for December and further that in his opinion, the character of the witnesses was such, that they could not be believed, and that he was not desirous of breaking a lease on the testimony of such witnesses as were produced on the hearing.

the record, we would be inclined to hold for the plaintiff, in that he had established his case. We have not, however, the same opportunity of seeing and observing the witnesses as the trial judge, nor arriving at an opinion as to their credibility, by a simple reading of the printed questions and answers. The judgment formed by a trial court, after having seen the witnesses, their manner of testifying, and the apparent candor of each, or lack of candor, is much more liable to be correct than an opinion formed by us, without an opportunity to visualize the different witnesses while in the act of giving their testimony. Courts have recognized this fact and have established the rule that the finding of a trial court in a proceeding without a jury, or of a chancellor in a proceeding, where the witnesses are heard by

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him, will not be reversed, unless the finding is manifestly contrary to the weight of the evidence. People, ex rel Hirsch v. Magel, 243 Ill. App. 490.

We cannot say under the circumstances that the finding is so manifestly contrary to the weight of the evidence that we should be called up n to substitute our opinion for that of the trial court.

It appears that a checkfor the December rent was paid on the night of December 1st. This check was received by the son of the plaintiff at the plaintiff's home. It was subsequently cashed by plaintiff and no offer to return the money for the December rent was made by the plaintiff. It appears further that if there was any gambling on the premises at all, there certainly was no gambling after December 1st.

Oross, the witness who testified that he was the agent for the plaintiff, stated that he had played blackjack on the premises July 20th, so that it may be said as a matter of fact that the plaintiff had knowledge that there was blackjack played upon the premises prior to December 1, 1928, at which time he accepted the December rent.

The lease contains a chause to the effect that the receipt of rent, or any part thereof, shall not operate as a waiver or right to forfeit the lease for the period still unexpired. We do not believe this clause in the lease has any effect, other than to give the power to the lease has any effect, other than to give the power to the lease to terminate the lease in the event of a continuing violation. In other words, that the plaintiff had the right to terminate upon a violation of any of the covenants of the lease and would not be previous bound because of a condensation of abreach. By the acceptance

him, will not be reversed, unless the finding is manifestly contrary to the weight of the evidence. Feeple, as rel Mirsch w. Magel, 265 111. App. 460.

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of rent, however, he would be held to have waived his right of action because of any breach occurring prior to the acceptance of the rent, if he knew at the time that there had been a breach of the comenant. Arado v. Maharis, 232 Ill. App. 282; Shephard, et al. v. Eye, et al, 137 Wash. 180; Zotalis v. Cannellos, 138 Winn, 179.

After the starting of the cause of action, plaintiff would not be precluded from accepting rent, because by the starting of the action, he had exercised his option to terminate, whereas, by the acceptance of rent prior to the starting of the action, he would have waived his option to terminate. Plaintiff served his notice to terminate the lease on the 15th day of December, 1928. This notice to terminate was not accompanied by the return of the December rent. The trial court held that this constituted waiver of his right to maintain the action. The question presented for the trial court was one as to whether or not at the time the plaintiff accepted the rent, knowing of the fact that there had been breaches of the covenant, he intended to waive the breach. This intention had to be gathered, not only from the element of time, but from all the other facts and circumstances in the case. If, as a matter of fact, at the time the rent was accepted, it was intended by plaintiff as a waiver of the breach, then he could not maintain the action. The trial court having so found, as stated in his opinion, we can not say that the finding was manifestly against the weight of the evidence.

For the ressons stated in this opinion, the judgment of the Circuit Court is affirmed.

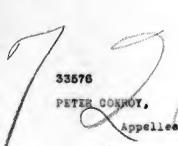
JUDGEENT AFFIRMED.

of rest, however, he reald be haid to have waived his right of sociates because of any breach securitar prior to the acceptance of the rest, if he knew at the sine that there had been a breach of the comenant. Area v. Maharis. 252 iii. App. 388; Shaphard. et al. v. Ore. of al. of

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For the remands stated in this coinion, the judgment of the Circuit Court is willrawd.

AUGUSTRES OFFICEDS.



RELIANCE ELEVATOR COMPANY and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., & COPP..

Appellants.



Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Peter Conroy, plaintiff, filed his statement of claim in the Municipal Court, charging that on January 9, 1925. he was employed by the Reliance Elevator Company, a corporation. a defendant in this proceeding; that in October, 1925, at the request of the Reliance Elevator Company, plaintiff called at the office of the Eurich General Accident and Liability Insurance Company, the other defendant in this proceeding, and was given two checks, - one for \$105 and one for \$30, which were in payment for temporary compensation. Charges that these checks were lost or destroyed, and that the defendant last named promised to issue new checks, but failed so to do. The defendants in their affidavit of merits admitted that the plaintiff sustained accidental injuries while in the course of his employment on June 9, 1925; that said injuried arose out of and in the course of his employment and that the plaintiff and the defendant Reliance Elevator Company were operating under and subject to the Workmen's Compensation Act.

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Fater Gonray, plaintles, Ciaca bis statesant of claim in the hemicipal deart, cherging that on Jeanery 3, 1988. he was earloyed by the delianos Merator Tompany, a corporation. a defendant ha this proceeding; the tin October, 1985, at the belies this relience whereas we would entitle of the beaute at the office of the furief teneral sendent and liability ineurshop Jonesery, the other defendent in this proceeding, and wes given two chacky, - one for \$105 and one for \$50, which were in payment for temporary compensation. The rose that these cheeks were less or accercycl, and the the drieding last baned promised to layer any checks, but falled be to do. The defendantsian their affidavia of artite admissed thre the plaistiff eversions confidency injuries ubits in the course of his employment on June 9, 1925; that said injuries arose Thisning one test has themrolyne and to extuce eds at has to two and the defendent Beliance Blevator Commony were operating under and subject to the springs Conjugue has tehns

Further charges that plaintiff filed an application for adjustment of the claim with the Industrial Commission of the State of Illinois September 17, 1928, a copy of which statement of claim is attached to the affidavit of merits and made a part thereof. Charges that there was a hearing on February 6, 1929, at which time a claim was made before the Industrial Commission for the amount set out in the statement of claim. in this proceeding; charges further that the Zurich General Accident and Liability Insurance Company, is the insurance carrier of the Reliance Elevator Company under the provision of the Workmen's Compensation act of Illinois. Defendants further claim that they are not liable to pay any sum unless found to be liable by the Industrial Commission and deny that there was any good or valuable consideration for the issuance of the checks.

In the course of the discussion before the trial court, a statement was made to the effect that this claim filed before the Industrial Commission had been withdrawn, but there is no evidence in the record in substantiation of this fact.

The Workmen's Compensation Act is a statutory provision which was enacted for the purpose of providing a forum with jurisdiction of all claims arising thereunder. The act was passed for the purpose, not only of providing for a place where the parties could adjust their differences, but, by its terms, it was intended to exclude all other forums. It is a statutory provision intended not only to protect the rights of the parties, but the welfare of the State. The industrial Commission provided for in said Act could not be deprived of its jurisdiction by agreement even of the parties themselves. International Coal & Mining Co. v. Industrial Commission, 393 III. 524.

for adjunction of the civic plaintiff filed an application of for adjunction of the civic for the the industrial consistency of the adjunction of the state of the state of the state of civic for artist and made agait of claim is attached to the affidavit of artist and made a part thereof. Charges that there was a learning to Polymany decision for the interior of the industrial decision for the contest of the industrial decision for the attached of the industrial activity proceeding therefore the test the transfer of the industrial decision and the industrial decision and industrial formal decision and industrial formation and deny the theory and contains the transfer to by the industrial formation and deny the the theorems.

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While the insurance carrier provided by law is primarily liable, it is also subject to the jurisdiction of the commission and its liability is dependent upon the relationship of the parties.

No evidence was heard in the proceeding at bar, but the judgment appears to have been entered upon the pleadings. On the facts as set forth in the pleadings it appears that the Municipal Court of Chicago did not have jurisdiction to entertain the cause of action, as the matter was then pending before the Industrial Commission.

There was no evidence upon which a judgment could be entered against the defendant, Reliance Elevator Company, and there is nothing in the statement of claim which would warrant a judgment against it. If for no other reason, the cause should be reversed as a joint judgment could not be entered where there was no liability as to one of the defendants.

Because of the fact that the trial court had no jurisdiction of the matter, it necessarily follows that the plaintiff be required to resort to the Industrial Commission for such relief as he may have.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

RYNER AND HOLDOM, JJ. CONGUR.

while the insurance corrier provided by Let is primarily Linkle, at is also scuper to the jurisdiction of the comission and its limbility is december upon the riskloanth of the parties.

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MARTIN URBAITIS, otherwise known as

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VALERIA URBAITIS, otherwise known as Valeria Urbutis, et al,

FRANK STANKUS,

Appellant.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal by Frank Stankus, one of the two defendants, from an interlocutory decree for an injunction restraining him from instituting any foreclosure suit under a certain trust deed in which he is named as trustee. The interlocutory decree was granted without notice and without bond and is based upon the bill of complaint and the affidavit thereto attached.

ant, Martin Urbaitie, was married to the defendant, Valeria Urbaitis, until February 1920, when she left the complainant; that she subsequently, in 1925, returned to complainant and they lived together as husband and wife; that shortly thereafter complainant purchased the real estate in question with his own funds, paying \$5,000 therefor, of which he had berrowed \$2,000 from the defendant, Frank Stankus; that the legal title was taken in the name of complainant and his wife in

ANTENDOUGHANDS ARERAL

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FROM SHPERIOR COURT.

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Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTIC Thigh delivered the .truco set lo acinico

This is an apperl by Frank Stockers, one of the two defendants, from an interlocutory deares for an injunction restraining him from incritucing any forgolosure anit under a cortain trust dood in which he is named as trustee. the solten fundity bedieve and sever greater antice and without bond and is beard upon the bill of complaint and the affidavit therete ettached.

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the defendant Stankus, a trust deed was given to him as security to secure his note for that amount; that this note was payable two years after date with interest at five per cent; that the defendants, Valeria Urbaitis and Frank Stankus, combined and confederated together and caused the removal of the complainant from his house; that the said Stankus is trustee under the said trust deed and is the legal holder and owner of the notes secured by said trust deed and is threatening to sue complainant and to institute foreclosure proceedings, based upon pretense that the interest payments had not been made.

The affidavit in support of the bill of complaint, states that the complainant's rights would be unduly prejudiced unless an injunction was issued immediately, without notice and without bond. The reason stated in the affidavit for the waiving of the bond is based upon the statement that the complainant is financially unable to give a bond.

The order recites that, upon a reading of the bill and the affidavit thereto attached, and it appearing that there is good cause shown, it is ordered that an injunction issue in the above entitled cause without notice and without bond.

Chapter 69, Section 3, Cahill's Inlinois Revised Statutes of 1929, provides:

<sup>\*3.</sup> NOTICE OF APPLICATION.) \$ 3. No court, judge or master shall great an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it shall appear, from the bill of affidavit accompanying the same,

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TR. WOLLTO OF LELICATION,) & C. SO GOLT, judge of making of an injunction with out proving notice of the sufficient place of the sufficient having beautiful to the sufficient that there is no all do and the to be affected thereby, or such of them as concern, where it shall alway.

that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately or without such notice."

section 9, provides that before the issuance of an injunction, complainant shall give bond, except for good cause shown. There are no facts set out in the bill of complaint or the affidavit, upon which the order could have been entered granting an injunction without notice. The statement that unless the injunction issue without notice, the complainant would suffer irreparable injury and loss, is a conclusion and not such a statement of fact as would warrant the issuance of the injunction.

Grabarski v. Stankowicz, 179 Ill. App. 45.

A court granting an interlocutory injunction without bond should require such facts, either in the sworn bill of complaint or by affidavit, or by evidence heard, as would warrant the court in arriving at an opinion from such facts, that the complainant would be irreparably injured. The allegation that the complainant was financially unable to give a bond, is not a sufficient allegation of fact, particularly as the bill charges he was the owner of the premises in question.

There is no allegation that the defendant is insolvent or about to leave the State, or any fact in regard to the defendant which would authorize the issuing of the injunction without bond. The statute is primarily for the purpose of protecting the person against whom the injunction issues. If it would appear that no harm would be done by the issuance of such injunction without bond, then that fact might be taken into consideration by the court, but no such

that the rights of the compensate will be undily prejudied in the injunction is not is not issued in the interpretation.

Gretien 3, provides that basors the insurance of an injunction, constituent shell give cond, except for good cause shows. There are no feets set out in the bill of complaint of the affidavit, upon which the order could have been entered graphing an injunction without notice. The statement that unless the injunction issue without notice, the complainant would suffer irreparable injury and less, is a conclusion and not such a statement of fact as sould serrous the injunction.

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There is no allegation that the defendant is the report of the shoot in report to the fine of the fine of the fine of the state of the stating of the talunction without bond. The statute is primarily for the purpose of protecting the person against vious the lajunction is severe. If it would not so that no hape wrold be done by the issues of such injunction without bond, then that fact

facts appear in the present proceeding. The injunction should not have been issued without notice nor without bond.

For the reasons stated in this opinion, the interlocutory decree is reversed.

INTERLOCUTORY DECREE REVERSED.

RYNER AND HOLDOM, JJ. CONCUR.

facts appear in the present proceeding. The injunction should not have been issued without notice nor without bond.

For the reasons at this opinion, the interiorator, the interioratory dances is reversed.

INTERCOPTONY DIG IN NEVERSED.

RYWIE AND HOLDER, JJ. CORCUR.

3 A91 BENJAMIN G. POLLARD.

Appellant,

V.

WILLIAM E. McCOY, trading as The Grand Hotel,

Appellee.

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MUNICIPAL COURT
OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE HOLDON delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment of nil capiat and for costs on a trial before the court without a jury. It is said to be an action of replevin, but all we find abstracted in relation thereto is:

"September 21, 1938, affidavit for replevin filed, Affidavit of replevin.
September 21, 1928, a certain writ of replevin issued out of the office of the Clerk of the Municipal Court."
"September 28, 1938, replevin bond filed. Replevin bond."

There is no mention of any property replevined. It is impossible to say from the abstract whether it is a horse, or a calf, or household furniture, or a trunk which is the subject matter of the replevin suit, and it is a well settled rule of this court that we will not go to the record for any fact necessary to reverse a judgment. Therefore, the abstract which is the pleading of the parties, presents nothing for review.

Further perusing the trial we come to the evidence and about all we find is that plaintiff went to live at Hotel Grand on the 19th day of September, 1928; that he lived there about a year and he voted from that hotel, giving his former

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## Opinion filed Jan. 2, 1950

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This is an appeal by the phaintiff from a propert of nil penish and for costs on a trial before the court sittems at jury. It is eath to be no action of requerer, but and a first spatiantial in relation thereto in:

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place of residence, tells about renting a room at \$17 a week and that he paid in advance according to his undertaking; he tells about the time he lived there, during part of which time he was at Camp Grant at Rockford, Illinois, and that there was a restaurant in connection with the hotel at times. The court asked the witness; "Do you owe them anything", to which he replied "yes"; then the court asked "how much" and he answered "about \$62" and that he never tendered them the money. And that is all of his testimony, which comprised all of the testimony proffered on behalf of plaintiff.

In this state of the proofs there was naught before the trial court nor this court which entitled the plaintiff to recover in the alleged action of replevin.

As in the state of the abstract and the evidence found therein plaintiff proved no cause of action of any kind, the trial court did not err in finding the issues for the defendant, and its judgment is therefore affirmed.

AFFIRMED.

WILSON, P.J. AND RYNER, J. CONCUR.

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WILDON, P.A. AME PROMIS AND TWO IN

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R. WELIAMS,
Appellee,

MRS. PHILIP R. O'BRIEN,
Appellant.

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APPEA FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff recovered a judgment in the Municipal Court of Chicago, upon a trial without a jury, for \$175.00, for damages caused to his automobile, because of a collision with an automobile in the possession and control of the defendant.

At the time of the accident the plaintiff was driving a ford automobile in an easterly direction on Grand Avenue in the City of Chicago. The defendant was driving a Cadillac automobile in a southerly direction on Wells Street, an intersecting highway. There is a conflict in the testimony as to the rate of speed at which the plaintiff's car was being operated and as to the place where the accident occurred. There were two street-car tracks on each highway. There were no signal lights at the intersection. On direct examination the plaintiff testified that he approached the intersection, going east, at a normal rate of speed; that when he got to possibly the center of Wells Street a street-car passed him, going in a westerly direction on Grand Avenue and that the defendant was not driving fast. On cross-examination he said that when he passed the street-car "it was probably about two-thirds across the crossing"; that when he entered the intersection the

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Opinion filed Jan, 2, 1930

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street-car was about even with the west tracks on Wells street; that he was going at the rate of fifteen miles per hour and that he did not see the defendant's automobile until it was about ten feet away. Upon examination by the court, he stated that his car was in the middle of Wells Street when the defendant's automobile struck the front of his automobile.

The defendant testified that she stopped before entering the intersection and that before proceeding southward the back end of the street-car referred to by the plaintiff had reached the sidewalk or "the path for the pedestrians on the west hand side of Wells Street"; that in her opinion the plaintiff's automobile was going at a rate of about twenty-five or thirty miles per hour; that when she first noticed the streetcar it was in the center of the intersection.

The court then interrogated the defendant, and the questions put and the answers made were as follows:

"The Court: There was the Ford car when you started up on low gear after the passage of the street our beyond your vision, how far was the Ford our from your vision at that time?

It was not in my sight at all.

The Court: It must have been sometime.

When I reached the intersection of Wells and Grand Avenue.

The Court: How far was that away.

A. It was just to the right, about twenty-five or thirty feet.

You had not seen it before? The Court:

A. The street car had passed, and had cleared the other side of the street, the west side of Wells Street, and there was no other traffic coming, so I started up in low gear, and just as I reached the center of the intersection, this Ford car, at a high rate of speed, orashed into me."

The only other witness to the accident was Walter He was going north on Wells street and, before crossing Earle.

street-sur was about even alth the rest tracks on male street; that he was soing at the rate of rifern miles for hour and that he did not see the defendant's sufemobile until it was arout ten feet ever. Then erasiasion by the court, so attent the his cor was in the offendant's attent the track that the defendant's automobile struct the front of has surgentile.

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Grand Avenue, stopped his automobile for about thirty seconds. He testified that, in his opinion, the plaintiff's automobile, just before entering the intersection, was going at a rate of twenty-five to thirty miles per hour. The significant feature of his testimony is that he repeatedly stated that he did not see the street car which both the plaintiff and the defendant may was crossing Grand Avenue just before the accident happened.

The trial judge, at the close of the case, commented upon the fact that the witness Earle testified that he did not see the street-car although he observed that the plaintiff's automobile was going at the rate of twenty-five to thirty miles per hour. He also expressed an opinion that if the plaintiff was going at that rate of speed and the defendant entered the intersection with her automobile in low gear the accident could not have happened.

There is considerable discussion in the briefs about the statute giving the drivers of autohobiles, approaching from the right, the right of way. The defendant cites a number of cases which hold that all of the facts and circumstances surrounding the accident should be taken into consideration and that the statute should not be so applied as to give the exclusive right of way to the party approaching from the right, in all cases. With this rule we agree. But in the instant case neither party discovered the presence of the other until it was too late to avoid a collision. Under the circumstances the court was justified in finding that the street car obscured the vision of both parties and that the defendant was at fault in entering the intersection until she was assured that no vehicle was approaching from the right. In addition to this, the

Erand Avenue, thooped his suitenebile for about thirty seconds. He testified that, in his cointer, the claimitiff a actomobile, just before antering the inter-coin, we woint at a rate of twenty-five to thirty whice per cont. The significant feature of his testiment is that he rest twily stated that he did not see the street car which both the plaintiff and the defendant say an aromaly drank result just before the accident happened.

The trial judge, at the state date of the cone, consented upon the fact that the ciras. The testified what he did not east the fact that the discussion is although he preciond that the listiff automobile med guing as the rate of treaty-fire to thirty wiles per nour. He circ expressed as a intended the fact of that rate of apend and the factor of the rate of apend and the intermedian rith her submobile in ion year the socient sould not have a present.

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defendant, when interrogated by the court, first stated that when she started to enter the intersection the plaintiff's automobile was not in sight. Then she testified that when she reached the intersection of wells street and Grand Avenue the plaintiff's automobile was about twenty-five or thirty feet to the right. She said this despite the fact that she had previously testified that when she first saw the plaintiff's automobile she did not have time to put her foot on the brake or clutch before the collision took place.

we find nothing in the record which would warrant us in disturbing the finding of the trial court that the defendant was liable for the damage to the plaintiff's automobile.

An automobile mechanic of twenty-seven years experience testified that the plaintiff's automobile, before the accident was worth \$200.00 or \$350.00 and that it would cost about that amount to put it in good condition. He further testified that he hardly thought that the automobile, before the accident, could have been sold for the amount at which he valued it.

The trial court fixed the damages at \$175.00. He would have been warranted in assessing damages in a larger amount but of this the defendant ought not complain.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

PILSON, P.J. AND HOLDOM, J. CONCUR.

defendant, when interrogeted by the court, tiral strend that when whe started to enter the intersection the shortiffe automobile was not in sight. Then obs testimal that when she reached the intersection of Telis aurent and ir all requirements as about transpolite or thirty feet to the right. The said this duscite the first the had previously testiful the right. The said this duscite the first the that the claiming feet automobile and this duscite the size of the claiming feet automobile and did not have the out has four on the order or always before the opiliaton inch ont has class of the order.

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WORRIS FORMAN, Trading as Forman's Furniture Store,

Appellee,

V.

FRANK BALSANO,

Appellant.

255 I.A. 624

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff instituted suit in the Municipal Court of Chicago to recover from the defendant the contract price of a plane. There was a trial before the court, without a jury. The court found in favor of the plaintiff, assessed his damages at the sum of \$1500.00 and entered judgment upon the finding. The defendant appealed.

The statement of claim alleged that the plaintiff sold the piano to the defendant, "for the contract price of \$1500.00", that the piano was delivered to the home of the defendant, on July 13, 1927, and that thereupon the sum of \$1500.00 became immediately due and payable. In his affidavit of merits the defendant, among other things, swears that he did not purchase a piano from the plaintiff at a contract price of \$1500.00, or at any other price.

It appears from the undisputed facts that the piano was delivered at the home of the defendant on July 13, 1927, that later the defendant requested the plaintiff to remove the instrument, and, upon the latter's failure so to do, the defendant, upon the advice of an attorney, placed the piano in a warehouse and caused the warehouse receipt to be sent to the plaintiff.

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Opinion filed Jan. 2, 1930

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The court found in favor of the initial interest of its frager at the cum of Rick. On and entered judgment when the firsting. The defendant synealed.

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defendant, on duly 13, 1877, and that thereupon the sum of

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The plaintiff testified that he sent the receipt to the warehouse company with a statement that he had no interest in the piano.

The plaintiff testified to conversations with the defendant which were to the effect that the defendant made an outright purchase of the piano. The defendant, his daughter and his wife all testified to conversations which, if true, showed that the instrument was to be paid for only upon approval.

One of the principal points relied upon by counsel for the defendant for a reversal of the judgment of the trial court, is that there was no proof made of a contract price for the plane or any evidence of its value. We have read the abstract and also the original bill of exceptions, contained in the transcript of record, and find no evidence whatever, offered as to the value of the instrument. The only evidence of an agreed price was the conclusion of the plaintiff, when asked if the price of the piano was discussed, that "the price of the plane was fixed at \$1500.00." Counsel for the defendant promptly moved to strike the answer on the ground that it was a conclusion of the witness. His motion was sustained, and properly so. Counsel for the plaintiff does not complain of this ruling. With this testimony stricken, the record is left barren of any evidence of either an agreed price or the value of the piano. For this reason the judgment must be reversed.

We would be disposed to remand the cause except for the fact that, upon the oral announcement of the court's finding, counsel for the defendant immediately raised the question as to whether the court found that there was an agreement as to the price of the piano. If counsel for the plaintiff had any evidence the plaintiff tratified that he sent the recipt to the marehouse company with a statement that he has no interest in the plane.

The plannist tentified to conversations with the defendant that the testence and an defendant that the testence and an outright carciace of the lane. The telence at the decenter wad his wife out testific to conversations which, if true, and his the instrument was to be call for only apassed.

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to support the statement of claim, which alleged a contract price, and had overlooked the presentment of it, he should, at least, have asked the trial court's indulgence for the opportunity of offering to make such proof, instead of speculating upon whether the defendant would perfect his appeal and, if so, what the decision of this court might be.

The judgment of the Municipal Court of Chicago is, therefore, reversed and judgment entered here in favor of the defendant.

JUDGMENT REVERSED AND JUDGMENT HERE.

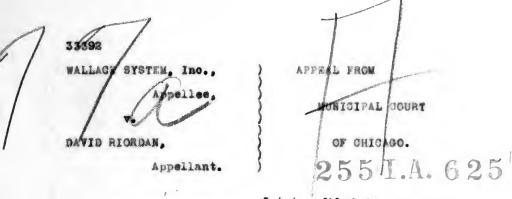
WILSON, P.J. AND HOLDOM, J. CONCUR.

to support the statement of claim, which alleged a contract price, and had overlocked the presentent of it, he should, at least, have saked the trial court's indulgance for the opportunity of offering to make such proof, instead of appearing upon whether the defendent rould perfect his appearl and, if so, what the deviates of this court might be.

The judgment of the Municipal Court of Chicago is, therefore, reversed and judgment entered here in favor of the defendant.

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WILDOW, P.A. FRA ROLLOOK, A. CORTUR.



Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court:

The plaintiff brought suit in the Municipal Court of Chicago to recover the amount alleged to be due under a contract in writing, which was as follows:

"WALLACK SYSTEM, INC. 11th Floor Medinah Bldg. 178 W. Jackson Blvd.

The undersigned hereby agrees to take the Wallace System of Physical Training, a service consisting of health building treatments, physical training and instruction, baths and massage as outlined in your circular, for the period of six (6) months from date hereof.

Wallace System, Inc., an Illinois corporation, agrees to maintain its establishment, furnish competent instructors and the within named service for the period of this agreement at 178 W. Jackson Blvd., Chicago, during the hours of 9 A. N. to 6:30 P. M. daily, Sundays and legal holidays excluded.

The undersigned in consideration of the above agrees to pay Wallace System, Inc. the sum of Two Hundred Bollars (\$200) within 10 days after the date hereof, which smount undersigned agrees to pay irrespective of the extent to which he may avail himself of the above named service.

himself of the above named service.

In the event that fire or other cause beyond control of Wallace System, Inc. necessitates temporary closing of its quarters, the period above mentioned shall be extended a number of days equal

to such shut-down period.

Wallace System, Inc. agrees upon request to examine blood pressure of undersigned from time to time; but assumes no other responsibility in regard to health or physical condition of undersigned.

Signed at Chicago, Illinois, this 30th day of

Jan. 1928.

David Riordan (Seal)

ACCEPTED: Cash 100. Bal. 30 days WALLACE SYSTEM; IEC. By Ambrose E. Deizs Vice Pres."

Opinion filed Jan. 2, 1930

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The trial court gave judgment in favor of the plaintiff for the sum of \$300.00 and costs. The defendant appealed.

The execution of the contract by the defendant and that he paid nothing under it are conseded by his counsel.

The contract was in printed form except for the words,

"Cash 100. Bal 30 days," which were in writing.

Upon the trial of the case, the only defense interposed by the defendant was an offer to prove a conversation
between Beiss, the Vice-president of the plaintiff, and the
defendant, before the execution of the contract, to the
effect that the defendant was not to be obligated to take the
treatments provided for in the contract, or to pay for them,
unless and until he saw fit to commence taking them, and that,
up to the time of the trial, he had not used the service and had
no present desire so to do.

The trial court rejected the offer of proof, and properly so. Oral understandings, if any, made prior to the execution of the contract were merged in the written instrument. There was no charge of fraud or misrepresentation, and the sole contention of counsel that the court should have admitted evidence of a parel understanding is that the insertion of the words above quoted rendered the contract vague and uncertain. With this contention we cannot agree. A most cursory examination of the contract discloses that it is free from ambiguity.

The judgment of the Municipal Court of Chicago is, therefore, affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

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The execution of the contract by the defendant and that he paid nothing under it are concret by als crucal.

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<sup>.</sup> TOACE . L . SOLOH OWN . N. W . NICOLE

33415 MEYER L. GORDON, dokny

MEYER L. GORDON, doing business as MEYER L. GORDON & CO.,

Defendant in Error.

V.

FRANCES R. SULLIVAN.

Plaintiff in Error.

255 I.A. 625

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

on February 16, 1928, the plaintiff filed his statement of claim in the Municipal Court of Chicago, claiming a
commission of \$491.40 for the sale of certain real estate
owned by the defendant. The latter filed an affidavit of
merits and, on April 16, 1938, the parties went to trial before
the court, without a jury. The court found in favor of the
defendant and entered judgment upon the finding.

The record recites that on May 8, 1928, the plaintiff moved the court to "vacate order in this cause April 16, 1928" and that the hearing of the motion was postponed to May 19, 1928; that on May 19, 1928 the motion was denied; that on May 22, 1928 the plaintiff moved the court to vacate the order entered May 19, 1928, denying the motion to vacate the judgment entered April 16, 1928, and that the hearing on this motion was postponed to May 26, 1928; that on May 36, 1928, the court entered an order reciting that:

"This cause coming on for hearing on motion of the plaintiff heretofore entered herein to vacate order entered in this cause April 16, 1928, and the court being fully advised in the premises, sustains said motion and the same is hereby vacated and set aside and for naught esteemed."

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Opinion filed Jan. 8, 1930

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<sup>&</sup>quot;This was contemporal to bearing or and the same of th

The court then permitted the plaintiff to take a nonsuit and gave the defendant judgment for costs.

The transcript of record, although certified to be complete by the clerk of the court, does not contain any written motion, petition, affidavit or bill of exceptions.

The defendant sued out this writ of error to review the action of the trial court. The plaintiff has not filed any brief or argument.

The Municipal Court Act has fixed a period of time,

i. e., thirty days subsequent to the entry of judgment, as a
substitute for the common law term of court. When the thirty
day period expires the Municipal Court loses jurisdiction to
vacate its judgments except by petition in the nature of a bill
in equity.or, in case of errors of fact, by a motion in the
nature of the common law writ of error coram nobis.

The judgment appealed from was entered May 26, 1938.

recites that the cause came on to be heard upon the motion of
the plaintiff to vacate the order (judgment) entered April 16,
1928, and that recital imports verity. On May 19, 1928, more
than thirty days subsequent to the entry of the original
judgment of April 16, 1938, the court entered an order denying
the motion made May 8, 1928 to vacate the judgment. The court
then lost jurisdiction to vacate the judgment, upon motion,
and the judgment appealed from was beyond the jurisdiction of
the court, and therefore void.

In the case of <u>The People</u> v. <u>Wells</u>, 255 Ill. 450, the identical question here presented was involved. On September 15, 1911, James W. Waber recovered a judgment in the Municipal Court

The court then penalteed the printes tures and save the defendent judgment for court.

The braneript of record, withough certific to be complete by the cierk of the court, dues not contain any critten action, writed or bill of erections.

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The judgment appealed from more entered any 20. 1888. It recites that the cause of so to to be been upon to antion of the plaintiff to record the order (judgment) intered april 10.

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of Chicago against John F. waters. On Cotober 14, 1911 waters filed his motion to vacate the judgment, which was continued, and finally, on November 18, 1911, was denied. On December 14, 1911, waters filed another motion to vacate the order entered on November 18, 1911, and also to vacate the judgment. This motion was continued, and on December 18, 1911 was granted upon waters complying with certain conditions. The Supreme Court held that, upon the entry of the order of November 18, 1911, denying the motion to vacate, the judgment became final and could not be set aside "except upon appeal or writ of error, or by a bill in equity, or a petition containing all the essential facts to sustain such a bill."

## In its opinion the court said:

"Section 21 of the act establishing the municipal court provides that there shall be no terms, but that every judgment shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court, provided the motion to vacate, set aside or modify the same be entered in said court within thirty days after the entry of such judgment. A term of court is regarded; in law, as but one day or a unit of time, and all acts done within the term are reggrded as contemporaneous. Cyc. 732). During the term in which a judgment is rendered the court retains jurisdiction to modify or vacate it or set it aside and may untertain a motion for either purpose, which may be kept alive by proper continuances until disposed of .. There are notterms of the municipal court, and the period of thirty days is sub-stituted as the time within which the court can modify, alter or vacate a judgment or entertain a motion for that purpose. The court had jurisdiction on November 18, 1911, to act upon the motion filed on october 14, 1911, because the motion was filed within thirty days of the rendition of the judgment and was kept alive by successive continuances. If the motion had been danied by a court having stated terms the order would have been under the control of the court during the term, but as there are no germs of the municipal court, jurisdiction over the judgment was ended when the motion was denied, and a rule applicable to a court having terms could not possibly apply. Upon the demial of the motion on November, 18, 1911, the judgment became final by the express provision of section 31 that it should not thereafter be

of Chicago against John F. Prests. In Corporate, 1811 to the filled his motion to vacate the judywort, which was continued, and finally, on nevember 18, 1811, was dealed. On Jocosper 18, 1811, waters filed another motion to vacate the order enter don notion was continued, and also to vacate the judywort. This motion was complying with servata constitions. The Supress Jones hald that, upon the sutty of the order of neverer 18, 1911, and capting the motion to wante, the judywort to and of articles of not the sutty. Or a vacation continued of error.

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subject to be set aside except upon appeal or writ of error, or by a bill in equity, or a petition containing all the essentail facts to sustain such a bill. The action of the judge in entering subsequent orders was not only contrary to the express provisions of the statute, but was contrary to the principles upon which justice is administered and the rights and interests of litigants, which require stability and finality in judgments."

The judgment of the Municipal Court of Thicago, entered on May 36, 1928, is reversed and the cause is remanded with directions to vacate said judgment.

JUDGMENT REVERSED AND CAUSE REMANUED WITH DIRECTIONS.

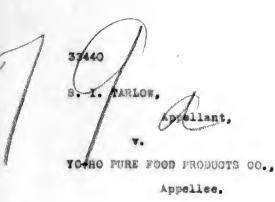
WILSON, P.J. AND HOLDOM J. CONCUR.

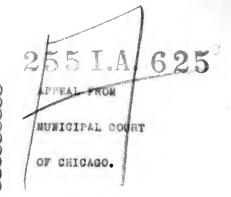
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Opinion filed Jan. 2, 1930

MR. JUSTICE RYMER delivered the opinion of the court.

The plaintiff recovered a judgment by confession, in the Municipal Court of Chicago, against the defendant for \$1,000.00, being the principal amount due upon a promissory note, together with interest and costs. The note was dated January 18, 1928, made payable, ninety days after date, to the order of H. L. Hall, and was signed by the defendant. It was endorsed as follows:

"H. L. Hall Belson & Lurie Account No. 1 Belson & Lurie."

The judgment was opened and the defendant given leave to plead. A trial, without a jury, was had, resulting in a finding and judgment in favor of the defendant.

It appears from the evidence that the plaintiff was a broker and financial agent employed by Belson & Luris, a concern engaged in the produce business in the City of Chicago. His title to the note is not questioned. Hall and the defendant were engaged in the same business. Hall bought potatoes from Belson & Lurie and sold potatoes to the defendant.

The defendant gave three checks to Hall, each made payable to his order. One was for \$500.00 and bore the date of April 18, 1938, the second was dated April 27, 1938, and was

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Opinion filed Jan. 2, 1930

ser, Dell E Tiber of Livered the opinion of the court.

The plaintiff recovered a judgment by confeation, in the wonicinal Jours of Thickey, appared the furthern for 11,000.00, being the principal amount for work, vegether is interest and correst the name of the confer date, to the framery 10, 1888, ands payable, sincey try tite fate, to the order of B. I. will, the sec algorithm by the set of order. It

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The defendant greaters consider to ..., the more received as greater the defendant for the consideration of the co

for \$250.00, and the third was dated April 30, 1928, and was in the sum of \$265.00. Each check was endorsed as follows:

"In payment of note due 4/18/28, H. L. Hall, Yo-He Pure Food Products Co., John H. Anderson, Paid 7/27/28."

It is conceded that these checks were given to
Hall for the purpose of enabling him to pay the note in question,
with interest, but the note was not paid by him or by the
defendant.

When the checks were delivered to Hall the note was not produced, but was in the possession of Belson & Lurie, or their agent, for collection.

The defendant, in support of the judgment of the trial court, contends that there was a course of dealing between the parties in interest which was tantamount to an authorization from Belson & Lurie to the defendant to make payment of the note to Hall. With this contention we cannot agree.

direct business dealings or transactions with the defendant, except in connection with the payment of the note in question. For a period of three or four years Hall bought potatoes from Belson & Lurie upon credit. He sold potatoes to the defendant and extended credit to it, during the same period. The defendant was apparently short of funds and, from time to time, gave its notes to Hall, made payable to him or his order. Hall would then endorse the notes and deliver them to Belson & Lürie. Later Hall would pay the notes either with checks of the defendant made payable to his order, or with his own checks.

for 1350.00, and the taird was dated april 40, 1910, and was in the new of 13dt.00. Inch check was - morech as fullers:

"In payment of more due #/18/50, 1. (. 8-11, 70-40 Pure Food Products Co., Sohn a. anderson, Faid 7/87/38."

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If he paid with his own checks, he would later receive checks from the defendant in corresponding amounts.

It is apparent, from the course of dealing between the parties involved, that Belson & Lurie never extended any oredit to the defendant; that they never accepted its notes in satisfaction of the obligations of Hall; but that the notes of the defendant were deposited with them on the understanding that Hall would meet his own obligations, either with his own checks or those of the defendant.

For the foregoing reasons the judgment of the Municipal Court of Chicago entered January 32, 1929, and vacating the judgment by confession, is reversed, and the cause is remanded with directions to vacate the judgment of January 32, 1929.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

WILSON, P.J. AND HOLDON, J. CONCUR.

to enter a judgment rearing that the original judgment by confluences entered porember 1, 1928 Stand in bull sorce and effect as of the time of its rendition and that the plaintiff have execution therein.

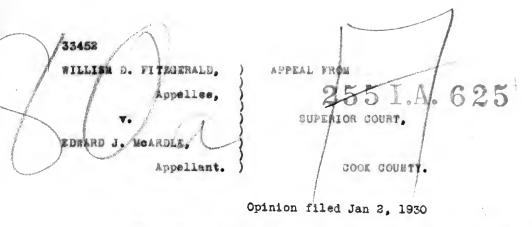
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For the foregoing recent the judgment of the Foliabel Jours of Unicipal Jours of Uniceyo entered January 28, 1939, and receiping the judgment by conference, is reversed, and the cause is recented with directions to recent

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WIRDON, I. J. AND HOLDON, J. J. JACONIA



MR. JUSTICE RYNER delivered the opinion of the court.

On June 3, 1927, the plaintiff brought suit in the Superior Court of Cook County to recover damages for personal injuries sustained by him, as the result of being struck by an automobile owned and operated by the defendant.

charged negligence in general terms. Later four additional counts were filed, the first alleging wilful and wanton conduct on the part of the defendant, the second charging him with failure to have his automobile under proper control, the third alleging failure to keep a proper lookout, and the fourth charging him with failure to sound his horn or to give any warning of the approach of his automobile.

In answer to a special interrogatory submitted to them by the court, at the instance of the plaintiff, the jury found that the defendant was not guilty of wilful and wanton misconduct, as charged in the first additional count of the plaintiff's declaration. They brought in a general verdict finding the defendant guilty and assessed the plaintiff's damages at the sum of \$37,500.00. Judgment was entered upon the verdict and the defendant appealed.

As to some of the facts there is no conflict. The accident happened about 2 o'clock on the afternoon of

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## Opinion filed Jan 2, 1930

MR. JUHILDE MIEAR delivered the spinion of the court.

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September 21, 1926, on South Mestern Avenue, in the City of Lake Forest. At the point in question the street was about twenty feet wide. The sky was clear and the surface of the street dry except that, according to the testimony of the defendant, there was oil on each side of the street which had leaked from the passing automobiles. The plaintiff, the operator of a laundry truck, had parked his truck on the east side of the street, facing north, while he delivered a bundle of laundry to a customer on the west side of the street. It was a north and south street. After making the delivery, the plaintiff returned to his truck and was back of it when the defendant's car struck him. He was caught between the front bumper of the defendant's car and the rear bumber of his truck, with the result that he sustained a compound comminuted fracture of the right femur above the knee and a compound fracture of the left leg between the knee and the ankle.

From the place of the accident persons, using the highway, had an unobstructed view for a distance of, approximately, half of a mile, to the north and to the south. It was a sparsely settled district. There were only three vehicles in the immediate vicinity at the time plaintiff was injured, i. E., his truck, the defendant's automobile and a ford automobile, occupied by a man and his wife, which was southward bound on the highway in question.

of age and married; that he had lived in Lake Forest all of his life, except for the nineteen months when he was in army service, and that he had been in the laundry business, on a commission basis, since 1923; that on the day in question he was delivering laundry along his route as he proceeded northward;

September 21, 1920, on wouth , estern Avenue, in the lity of Lake Forest, at the coins in question the street was though treaty feet wide. The sky was class and the surface of the ads to enoughest eds of guiltoces, sads topoxe wit teers defendant, there was oil on each side of the errer which had looked from the passing suspensiles. The pigletiff, the operator of a Laundry truck, had parked his truck on the east aids of the street, facing north, chils be delivered a bundle of laundry to a customer on the week side of the etreet. It was a morth and sauth street. After making the delivery, the and neder the to Moral and bus Acuts and of bearuhor. This change defendant's our struck bin. Se was onught between the front bumper of the defendant's our and her rear busher of his truck, hespaines bounds a bontaises of tade fluor add die baccago e bin sons old avoid numer sight out to excited? calder edd has some old messed gul atel edd to exuderal

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The plaintiff teatiled that he was thirty-two yerrs of age and maried; that he had lived in Lake lovest vil of his life, except for the minetern neuths com he was in army service, and that he had been in the lander, but here, on commission basis, whose left; that on the day in question he was delivering innerty along the route as he propered norths rd;

of his customers, walked acrees the street with a bundle of laundry, delivered it, and then proceeded back across the street to the rear end of his truck; that when he came out towards the street, on the west parkway, he looked both ways and did not see anything within three hundred or four hundred feet; that he did not run either back of or in front of an automobile as he crossed the street and did not see either the Ford automobile going south or the automobile belonging to the defendant, until he found himself pinned in between the defendant's automobile and his own truck, and that as he proceeded across the street he did not hear or see anything coming.

In the rear, opening outwards from the center. The plaintiff said that, when he returned to his truck, he went to the rear of it for the purpose of arranging the bundles of laundry for convenience in making future deliveries, and that he was so engaged for about thirty seconds before he was struck by the defendant's automobile.

There is much discussion in the defendant's briefs about the facts as to the direction in which the plaintiff was faced, at or just before the moment of impact, and whether he was standing or moving. There was a conflict in the evidence which presented an issue for the jury. Even if the plaintiff was facing east and was moving in that direction when the defendant first saw him, as counsel contend, it does not necessarily follow that the plaintiff was at fault, or that the defendant was not guilty of negligence. The outstanding facts are that the plaintiff's truck was parked on the extreme right of the street, facing north, and that he was directly back of it when the collision occurred.

that he parked his truck immediately opposite the home of one of his customers, walked acress the atreet with a bundle of laundry, delivered it, and then proceeded back acress the exrest to the rear end of his truck; that when he came out towards the street, on the west parkway, he looked both ways and did not need anything within three hundred or few bundred feet; that he did not run sither back of an interest the ferd automobile as no ordered the street and did not see sither the ferd automobile he going south or the automobile belonging to the defendant, until he found himself pluned in between the defendant's automobile he found himself pluned in between the defendant's automobile he did not hear or see anything coming.

The leading truck had an englosed budy sith two deors the rear, spening outsands from the center. The plaintiff said that, when he returned to his truck, he cent to the rear of it for the purpose of arranging the bundles of loundry for convenience in making future deliveries, and that he was so convenience for about thirty seconds before he was struck by the defendant's automobile.

There is and discussion in the defendant's oriefs appearing first factor to the the discussion is which the plaintist was sneed, at or just before the condent of impact, and whether he was standing as soving. There was a conflict in the cuidence which presented an issue for the jusy. Ivan if the plaintist was facing as the discussion when the defendant sixt cast him, as counsel contend, it does not necessarily follow that the plaintist was et foult, or that the descentity follow that of negligence. The outstanding facts are that the discussion and guilt's struct was parked on the extreme right of the street, inclus north, thus he said directly tack of the street, inclus north, that that he said directly tack of the street, inclus north.

Alfred Crittendon testified, by deposition, that he was a butler for C. J. Owens, a Lieutenant colonel in the United States regular army, stationed at Fort Sheridan, Illinois, and that his wife was employed in the same household; that on the occasion in question he, accompanied by his wife, was drifing his Ford touring car south on the street on which the accident happened; that he saw the laundry truck and the approaching automobile of the defendant, but did not see the plaintiff until he heard a crash; that he walked back and saw the plaintiff lying between the two automobiles; that he backed up his automobile, which was about three car lengths away when he heard the crash, and took the plaintiff to a hospital, and that when he saw the defendant's automobile, just before the accident, it was going fifteen miles per hour and was on the east side of the street. He said that by a car length he had in mind a distance of fifteen or eighteen feet. He finally said that he was about 115 to 120 feet beyond the place of the accident when he stopped his automobile.

Lottie Crittendon testified that she was the wife of Alfred Crittendon, and was with him in the Ford automobile when the accident happened; that the laundry truck was about two blocks distant when she first saw it; that she saw the plaintiff cross the street in front of the car, in which she was riding, at a distance of ten to fifteen feet away; that when she first saw him he was about half way across the street; that when he arrived back of his truck the defendant's automobile was "right behind" him, and that when she first saw the defendant's automobile it was fifteen feet away and the car, operated by her husband, had just passed the truck. She further testified that her husband was driving at the rate of about ten miles per hour, that the defendant's car was going fifteen miles per hour, and that her husband's automobile was about two car lengths beyond the truck when she heard the cream.

Alfred crittennion testified, by decomition, that he eds at lengter for J. J. Jerna, a thougant colonel in the accellet and the form of the boundaries and a ringer artest besine no toll this als see of the layer ball to the ball this bas the ceession in question be, amountained by his wife, one criving inchican sat deide no inerta eni no diven uno gatues bust ela peliforotype and the laura transfirst and the about themsended nationalis of the definance, but did not one the particle; weekl party itionical est was had been been of fadi (daste a breed an between the two automobiles; that he is exed up his automobiles. which was about three car impeths arry when he hard the ornan, and the plaintiff to a homestel, and there when he ere the defandant's antemobile, just before the accident, it was going iffern miles per hour a d eas not ten eret wide of the etreet. He said ther by a cor langth he had in which with the of fireen or elgisses feet, as finally six that be were their to to to feet beyons of made inchiner als to wool and inoped that .olidomotur

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The defendant testified that he was a lawyer, and seventy-one years of age at the time of the trial; that although he were glasses, to correct an astigmatism, his eyesight was good; that he was driving a one-seated, three passenger cabriolet, Hudson, and was accompanied by his wife and a wrs. Wills; that the brakes on his automobile were in good condition and that, at the place where the accident happened, the street was paved with bricks, worn smooth on each side of the oil tracks, made by the automobiles passing.

He further testified that he first saw the truck when he was two or two and a half blocks south of it, and that he was about a block or a block and a half south of the truck when he first observed the Ford automobile coming south, at a distance of two blocks, or more, north of the truck; that he saw that the Ford our was moving at a higher rate of speed than his automobile and would reach the truck first; that when the Ford car was opposite the driveway, leading into the premises where the plaintiff had delivered the bundle of laundry, he saw the plaintiff along the edge of the street, about the middle of the place where the driveway entered, apparently waiting for the Ford to pass; that he noticed that the plaintiff moved out, and the Ford automobile passed quickly, revealing the plaintiff passing right in the middle of the space which the defendant was going to drive into to pass the truck; that the rear end of the Ford automobile had passed the front end of his automobile when he observed the plaintiff at a distance of about fifteen feet back of the Ford automobile; that he immediately applied both the service and emergency brakes, but that his automobile slid twenty- to twenty-five feet until it struck the plaintiff, and he had no power over it; that, when he applied the brakes, he turned his automobile slightly to the east because it was

The defendant tostified that he was a larger, and severy-one years of the time of the trial; that although he note glasses, to correct an estimation, his eyesight sos good; that he was driving a con-souted, three vascenger cubrication and although authors, and was accompanied by his wife and a kes. Allies that the brokes on his automobile yere in good condition and that, at the place ever the automobile yere in good condition and that, with bricks, were the sent success of the other, were years with bricks, were successful an each side of the oil tracks, wade by the nutomobiles present.

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farther out in the street than the truck and he wanted to get in far enough to give the plaintiff a chance to save himself, and, that he did not have time to sound his horn, that the occupants of his automobile, including himself, screamed or "hollered", but that the plaintiff gave no heed.

The testimony of Mrs. Mills was substantially the same as that of the defendant except she said that when she saw the plaintiff in the middle of the street, moving east, he was moving as fast as he could and was stepping lively to get to his truck.

from the evidence that there was a private driveway leading into the residence where the plaintiff delivered the bundle of laundry, he was guilty of maintaining a nuisance, by leaving his truck parked in the street. It is contended that this act on the part of the plaintiff was the proximate cause of the plaintiff's injuries or, at least, that it contributed to cause them. On this theory, three instructions were submitted and refused. In refusing to give them, the trial court did not err. The plaintiff was engaged in a lawful business and was not making an unusual or unlawful use of the highway in question. Even if he were making an unlawful use of the street, it does not necessarily follow that such use constituted negligence on the part of the plaintiff.

when the plaintiff took the witness stand he was asked by his counsel if he was married. The answer was in the affirmative. Several questions were then asked him, to which he made replies, before counsel for the defendant raised any point about it being improper to ask the plaintiff if he was married. Counsel then moved for the withdrawal of a juror and a continuance of the cause, on the ground that counsel for the plaintiff,

farther out in the street than the truck and he wented to at a the interior that for plaintiff : on not to some the said that the time the sound bis that the time the sound bis cutomodile, including himself, derecaded or "hollered", but that the plaintiff you so her.

the testimony of ere, wills was substantially the even as that of the defendant except whe seld that when obt one that plaintiff in the middle of the ettect, moring wast, he mad moving as that so he could and one stapping lively to get to his truck.

Counsel for the defendent say view, because it appared from the eridence the tours of a rivate directly lated the treaty planting into the residence where the planting distinct description of invadry. The residence where the track is the set of the track of the chart is activated to the chart is activated to the chart is activated or the classification of the plantification of the chart is contributed to the chart is contributed to the chart in the relation of the chart is contributed of the chart in the time there instructions were substituted of the classification of the classification of the classification of the classification. The classification of the classification.

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in his opening statement, stated to the jury that the plaintiff
was a married man, and that the court had sustained an objection
to the statement on the ground of its immateriality. The motion
to withdraw a juror was denied.

In support of their contention that the trial court committed reversible error in this ruling, counsel have cited two decisions of the Supreme Court of this State. One of the cases is McCarthy v. Spring Valley Goal Co. 232 Ill. 473. In that case counsel for the plaintiff, in his opening statement to the jury, stated that the plaintiff had a wife and five children. An objection to the statement was interposed and sustained. In the examination of one of the witnesses, counsel asked a question which the Supreme Court considered well adapted to intimate strongly to the jury that the defendant was insured against liability for accidents of the character involved in the case. The court held that there was no justification for injecting these matters into the case, that it was obviously done for the sole purpose of prejudicing the jury, and that the error was of such a character that it could not be cured by an instruction or a remittitur. No authority, however, has been cited, holding that, in a personal injury suit, the reference, by statement or testimony, to the mere fact that the plaintiff has a wife, constitutes reversible error.

In the instant case, we might well dispose of counsels' contention, on this point, on the ground that their objection and motion to withdraw a juror came too late. We are, however, unable to perceive how the sympathies or prejudices of the jurors would be affected by the statement or proof of the mere fact that the plaintiff had a wife; A large percentage of men of the age of the plaintiff are married. In addition to that, many of them have

in his openion. It is ont, wheted to the jury that the visitiff was a service and that the court had marked an objection to the statement on the ground of its is anticity. To sother to sitherer a juror was seniod.

in support of their contration ter the tri- 1 ocure connitted reversible error in this railny, account here cited two decisions of the Supreme lower of this force, one of the sheed is acceptible volley logic. St iii. 473. In that case comment for the plaintiff, in his spenius statesons to the jury, evered that the a trait is ever ever bear a children. In objection to the shotement was interposed and sustained. In the areannetten of one of ine innesses, counsel Live Lorabirates drive therefor end do not be actived a beise simpled to intidute atrongily to the jury this defend of - a tesured westers limbility for eachieves of the corresponding in the order. The court bold that there are in justification for ing enting these antro the come, that it in obvious sent for the sole oursess of prejudicity the jury, and that the error was of such a correct the trailine to one or such by an instance on or a realfattur. In thorisy, however, has over the that BOGGERRANDS, SO STOR MADE FORE TORC SELECTIONS IN A C REFOLUTION. stitutes reversible arrors.

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children. These are matters of common knowledge.

After the defendant had rested his case, he was recalled to the stand by counsel for the plaintiff and asked if, at the time and just before the accident, he did not become very such confused and if he did not state to a man named Dunn and the Chief of Police of Lake Forest, a few days after the accident. that he became confused and that that was how the accident happened. His answers to these questions were in the negative. Plaintiff's counsel then called Dunn to the stand, who, over objection, testified that the defendant did state that he had become confused. The court refused to permit counsel for the defendant to show that, at the time Dunn talked to the defendant, he had a warrant for the arrest of the defendant and, that in the evening of the day on which the accident occurred. Dunn and two other police officers called at the defendant's home and threatened him with arrest unless he agreed to voluntarily appear in the lake Forest police court. The defendant was permitted to testify that he made no statement to any of the officers about his having become confused. These rulings of the trial court, if improper or erreneous, were not of such a nature as to warrant a reversal of the judgment.

It is further contended by counsel for the defendant that the trial court erred in refusing to enter judgment in favor of the defendant under the first additional count of the declaration after the jury had made a special finding that the defendant was not guilty of wilful and wanton conduct, that the court also erred in not directing a verdict in favor of the defendant as to the first, second, third and fourth additional counts of the declaration, and that the verdict is excessive, regardless of the character of the injuries sustained, because the evidence disclosed that the plaintiff was earning \$35.00

children. These are satters of common they solve.

defluors and defendant had reated his dust, he was reculled to the stand by councel for the plaintiff and assed if, as that time and funt before the weldent, he did not become viry auch onflored the dad not state to the the the the the chief of colles of Lake Forest, a few days after the condens, that he become confused and that true mes but the acoldent happened. His answers to these quotilies were in the negative. risinist? a decrease then delied June to the rhand, who, over objection, teelifted that the defendant did at to the be bed become confused. The court refused to permit coursel for the are part to about tours, of the time want falted to the defined he had a warrans for the arrest of the defendant and, that in the evening of the ity on thich the monifore property de Ann to but send a transported at the ballor are sille solice mente out responsible this areas and see any of the area of the seed of the in the last order police owart. The telephone was permitted to trace exact the and be and but the to any out the efficient events his having become nonfused. These rulings of the trial dours, II laproper or erroscous, were unt of such . Bathre of to verreut e reversed of the judgment.

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to \$40.00 per week and that the sum awarded by the jury, invested at the rate of 55 per annum, would produce an annual income of \$1,375.00 and leave the principal intact. These points are without merit. <u>McConkey</u> v. <u>Pennsylvania R. Co.</u> 251 Îll. App. 399 and cases there cited.

The facts in evidence presented issues which should properly be submitted to a jury. The story told by the plaintiff was not an improbable one and the jury had a right to believe it. If they did believe it, the plaintiff was entitled to recover and it matters not that in some particulars the plaintiff was contradicted by his own witnesses. Hrs. Crittendon said that the plaintiff orossed the street about 15 feet in front of the Ford automobile and reached a place of safety behind his truck before the Ford and the defendant's automobile passed each other. The plaintiff said that he did not pass either in front or in the rear of the Ford automobile, but that he was in a place of safety thirty seconds before he was struck. Crittendon said that he never saw the plaintiff until after he was struck. Crittendon further said that he backed his car from/ south to the scene of the accident. The plaintiff said that Crittendons came from the north and stopped where the plaintiff was lying between the two cars. The Crittendons testified before the plaintiff did. If the plaintiff was willing to commit perjury, it would have been to his interest, in several respects, to make his testimony accord with that given by the Crittendons.

It is finally urged that the jury awarded excessive damages. The plaintiff was about thirty years of age at the time of the accident. His earnings amounted to \$35.00 or \$40.00 per week. Dr. Theodore S. Proxmire attended him at the hospital. He testified that there was a compound comminuted fracture of the right femur above the knee, fragments running down into

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the knee joint; that the left leg was broken, with a compound fracture between the knee and the ankle. He further testified that because of the condition, he called in a bone specialist; that the plaintiff's legs were placed into a frame with a Hodgskin splint, which is a frame made of iron with bandages swung underneath for the leg to lie in and equipped with pulleys and ropes to pull on the leg; that from September 23 to Rovember 17, this apparatus was used with the weights on continuously; that during all of that time the plaintiff suffered such pain that he was given morphine everyday. He further testified that infection developed about the broken bones in the left leg and that the plaintiff had pneumonia for a period of ten days. He also testified that there is a twist in the left leg, a contraction of the muscles, and that these conditions will be permanent; that the plaintiff will never have any use of his right leg, that at the time of the trial the sinuses were still draining through the skin and would never clear up; that the knee is absolutely gone and that the leg should be amputated between the knee and the hip. The hospital and doctor bills amounted to, approximately, \$4,000.00.

The amount of the verdict was not excessive.

For the foregoing reasons, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HOLDOM, J. CONGUR.

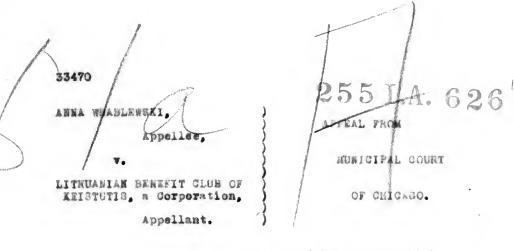
the knee joint; that the left leg was bream, with a con. ound fracture between the hase and the cubic. He further bestfiled that because of the condition, he onliked in a bone as activities e fil best a cial habile was aleka a hiteriale edu tade was trued filt noti 't of me was a fine and a fally alleghed eventor iti englise in al eli is hal bit tot dimentaban games reductor of 25 reducing must test ged out as law of segon be-17, this apparatus was used with the weights on continuously: the during all of that time the plaintiff suffered such Juin that he was given morphise everydes. He further coefified that infestion developed about the broken bunke in the left les and that the plaintiff had requently for a partud of ten days. We also tentified that there is a talet in the auth ing, a coned Lity smoid ('moo wand) field have, selesam and to nollsert nermneat that the name of this will never have one that the Lills are the sample as the tries of the tries ofe singues were ethics draining through the skin and rould mover clear up; that the knee is combutely and that the leg said by . 17: 88d between the race and the bip. The borgistal and uccess bills amounted to, approximately, a, Carlin

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out the foregoing respons, the gudy, at of the Juperior Jourt of Cone lourly is affirmed.

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Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff filed her statement of claim in the Municipal Court of Chicago, on Movember 14, 1928. She alleged that her husband died July 8, 1928; that, at the time of his death, he was a member, in good standing, of the defendant club and that, under the provisions of the by-laws of the club, she was entitled to certain death benefits aggregating the sum of \$265.00.

An issue as to her husband's standing in the club was raised by the affidavit of merits.

the plaintiff took the witness stand, in her own behalf, and testified through an interpreter. Her testimony throws no light upon the only issue presented for the consideration of the trial court. She said that her husband became a member of the defendant in 1919, that she demanded payment of the death benefits and that the defendant refused to pay.

John Alexander was then called as a witness for examination under Section 33 of the Municipal Court Act.

He testified that he was president and chairman of the defendant;

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Opinion filed Jan. 2, 1930

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doon slow when were our actived so we have not the first of the control of the property of the property of that the plaintiff's husband became a member of the club on February 4, 1938; that the defendant was the successor to an organization known as the Liberty Club; that the plaintiff's husband took over the member ship in that club of Feter Petritis, who died owing dues amounting to \$1.00 for the year 1927, which the plaintiff's husband was required to pay in order to become a member of the defendant.

The defendant introduced in evidence the first and third paragraphs of Article 21 of the by-laws of the defendant which read as follows:

"Every member of the Club shall pay to the treasury as follows: 25 cents monthly dues or three dollars (\$3.00) per year. Two dollars per year to the death fund and 25 cents per year to the flower fund and automobile fund, and 25 cents to maintain the library. Dues to the death, flower and library funds shall be paid in advance."

"A member who fails to pay his monthly proportional or other payments that are equal to three months in monthly dues shall have his rights suspended to the benefits in sickness, and being in arrears for dues for four months, shall not get death benefit. But all other rights shall be preserved until his climination from the Olub."

and also peragraph 5 of Article 5, profiding that:

"The death benefit shall be paid if the payments of dues of the deceased are not in arrears for four months of if there are no other dues (fines) amounting to the same sum."

The only proof of the payment of any dues by the decedent was a document, in which the entries were made by the secretary of the defendant. It showed that the only payments made were \$1.00 in March and \$1.00 in June of the year 1928.

The first payment was credited to "Payment for Fast year dues" and the other to "Death Benefit Fund."

that the plaintiff's husband became a member of the club on February 4, 1928; that the defendant was the successor to an organization known as the liberty Club; that the plaintiff's husband took over the member ship in that club of Feter Petritis, who died ewing dues amounting to 21.00 for the year 1927, which the plaintiff's husband was required to pay in order to become a member of the defendant.

The defendant introduced in evidence the first and third paragraphy of Article 21 of the by-laws of the defendent-which read as follows:

"Every as follows: Ab conta sunthly dues or three transury as follows: Ab conta sunthly dues or three dollars (\$5.00) per year. Two dollars per year to the flower thank and automobile fund, and 25 cents to the flower the library. These to the death, flower and library funds shall be paid in advance."

\*A member sho fails to pay his sonthly proportional or other payments that are equal to three months in monthly dues shall have his rights suspended to the benefits in sickness, and being in arrows for dues for four sonths, shall not set death benefit. But all other rights shall be preserved suttl his climination from the Olub.\*

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"The death benefit shall be paid if the payments of dues of the decembed are not in arrests for four months of if there are no other these (fines) amounting to the same aum."

The only proof of the payment of any dues by the decedent was a document, in which the sattles were made by the accretary of the defendant. It showed that the only payments ande mere \$1.00 in merch and \$1.00 in sume of the year 1938.

The first payment was credited to "Payment for Frat year dues" and the other to "Death Benefit Fund."

There is no evidence in the record showing, or tending to show, that the decedent, or any one representing him, directed or requested the defendant to apply these payments in any other manner, or that they were improperly applied.

From the foregoing it appears that the decedent was not a member, in good standing of the defendant club, at the time of his death, so as to entitle the plaintiff to recover the amount provided by the by-laws as a death benefit.

The case was tried by the court, without a jury, resulting in a finding in favor of the plaintiff and a judgment upon the finding.

For the foregoing reasons, the judgment of the Municipal Court of Chicago is reversed and judgment for costs entered here in favor of the defendant.

JUDGMENT HEVERNED AND JUDGMENT FOR COSTS HERE: IN FAVOR OF THE DEFENDANT.

WILSON, P.J. AND HOLDON, J. CONCUR.

is are is no evidence in the record shoring, or truited to show, that the decedent, or only one representing him, directed or requested the defending to apply these physhula in any other manuer, or that they were increperly epolici.

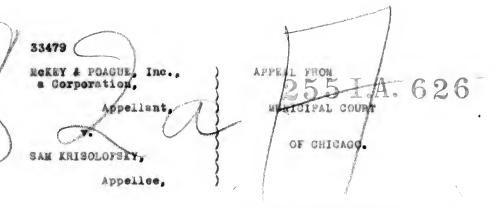
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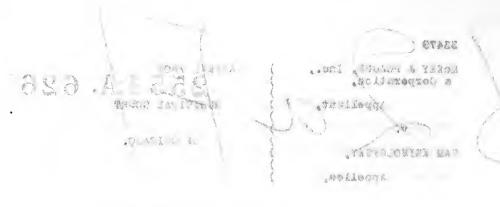
Opinion filed Jan. 2, 1930

MR. JUSTICE RYKER delivered the opinion of the court.

This was a proceeding in the Municipal Court of Chicago to recover a commission for the sale of real estate, resulting in a directed verdict in favor of the defendant at the close of the plaintiff's case.

The representative of the plaintiff, who conducted the negotiations for sale, testified that he had all of his dealings with the defendant's wife and that he never saw or talked to the defendant. There was no offer of any evidence showing that the defendant ever authorized his wife, either orally or in writing, to act as his agent, or even that he had any knowledge of the endeavors of the plaintiff to sell his property.

The plaintiff relies solely upon the affidavit of merits, filed on behalf of the defendant to establish the relationship of agency. The affidavit was on a printed form used in the Municipal Court and stated that the affiant, Ida Krisolofsky, was the duly authorized agent of the defendant



Opinion filed Jan. 2, 1930

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and had personal knowledge of the facts "in the above entitled cause." This was followed by a denial that the defendant ever listed the property in question with the plaintiff or agreed to pay to the plaintiff any commission. It may well be that the defendant's wife was his agent for the purpose of executing the affidavit of merits but, from that fact, there arises no presumption that she was his agent for the purpose of employing a broker in his behalf.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

\*ILSON, P.J. AND HOLDON, J. CONCUR.

and had personal knowledge of the facts "in the above entitled cause." This was followed by a denial that the detendrat ever listed the property in question with the plaintiff or egreed to pay to the plaintiff any commission. It may well be that the defendant's rife was his agent for the purpose of executing the affidavit of merits but, from that frot; their axions no presumption that she was his agent for the jurpose of executing presumption that she was his agent for the jurpose of sandowing a proper in his behalf.

The judgment of the mailtipel Court of Chicego is affirmed.

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JOHN E. RECKRODT and ELENORE RECKRODT.

Defendants in Error.

ENROR TO

CIRCUIT COURT.

COOK COUNTY.

255 I.A. 626

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

This writ of error brings here for review a decree of the Circuit Court of Cook County, in a proceeding to compel specific performance of a contract for the sale of land. The transcript of record is encumbered with copies of the original bill of complaint, an amended and supplemental bill, an amendment to the bill, and a pleading entitled, "amended bill to the amended bill of complaint." These pleadings were all superseded, by an amended bill of complaint, subsequently filed.

To the latter pleading answers were filed, in which the material allegations of the bill were denied. The cause was referred to a Master in Chancery who reported to the court, recommending that specific performance should not be granted but that the complainant should be awarded damages. The Chancellor sustained exceptions to the report and dismissed the amended bill of complaint for want of equity.

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Opinion filed Jan. 2, 1930

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of witnesses and that he had returned a transcript of their testimony to the court as a part of his report. But a copy of the transcript of testimony is not abstracted nor is it to be found in the transcript of record. We have nothing before us except the pleadings, the Master's Report of his findings of fact and conclusions of law, certain documents purporting to be exhibits but not identified as having been received in evidence, and the decree of the trial court.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

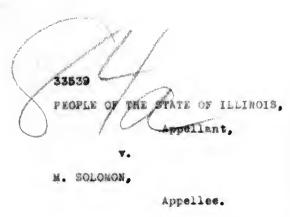
WILSON, P.J. AND HOLDOM, J. CONGUR.

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The degree of the Circuit Sourt of Sack Jounty is affirmed.

AT FLAMES.

WILECE, F. J. AKE MCL. DOWN. J. J. SACUL.



255 I.A. 626

APENT FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE RYMER delivered the opinion of the court.

An action in debt was instituted in the Municipal Court of Chicago in the mame of the People of the State of Illinois, at the instance of the Illinois Department of Agriculture, against the defendant. The proceeding was for the recovery of a fine for a violation of Section 34 of the Illinois Dairy and Food Statute, which reads as follows:

"No person shall within this state, manufacture for sale, have in his possession with intent to sell, offer or expose for sale, or sell, as lard, any substance not the legitimate and exclusive product of the fat of the hog."

Section 6 of the same act provides, in part, as follows:

"Wheever shall have possession or control with intent to sell of any food which violates any of the provisions of this Act shall be held to have known the true character, quality and name of such food."

The State had the right to appeal, as the original action was a civil one. People v. Milwaukee Dairy Co. 344 Ill. App. 341.

Proof of intent to violate the law was not necessary; under the express provisions of the statute. Lack of knowledge of the violation of the law afforded no excuse. City of Chicago v. Bowsan Dairy Co., 334 Ill. 294.

Opinion filed Jan. 2, 1930

wh. Justice diskn delivered the opinion of the coult.

On setion in dork was instituted in the contributions Court of Obioses in the ter same of the tropic of the Linte of Linteria, at the institute of the Lilients separated of Agriculture, against the deficable. The property of a fination of a viton of the theoremy of a fination of a viton of the lines Dairy and Food and Food and Follows:

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The appellee has failed to file any brief or argument.

The evidence discloses that a state inspector purchased from the defendant a pound of lard, represented to be pure, and that upon analysis the commodity purchased was found to contain three to five per cent of beef fat.

The trial court appeared to be of the opinion that the offense was of such a trivial nature as not to warrant the imposition of a fine against the defendant. Counsel for the State insists that the principal involved is of paramount importance and that, at least, a minimum fine should have been imposed. With the latter contention we agree.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

JUDGHENT REVERSED AND CAUSE REMANDED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

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WILLARD R. POWERS and WILBUR

Appellants,

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ARTHUR N. POWERS,

BAMURL INSULL,

COMMONWEALTH EDISON CO.

PUBLIC SERVICE CO. OF NORTHERN ILLINOIS,

ILLINOIS LIGHT & POWER CO.,

CENTRAL TRUST GO. OF ILLINOIS,

JOHN E. ETZKORN,

HELEN E. MOORE,

EDWARD M. BULLARD,

BEN H. MATTREWS,

CHARLES H. SEEBERGUR, and

EDWIN D. BUELL, Trustee of the Estate

of Arthur N. Powers, Bankrups,

255 I A. 627

SUPERIOR COURT

COOK COUNTY.

Appellees.

Opinion filed Jan. 2, 1930

## STATEMENT BY THE COURT

As said in Babcock v. Farwell, 146 Ill. App. 307.

""" In the conclusions to which we have arrived we do not deem it necessary or desirable to advert to all the varied matters appearing in the pleadings, or to discuss all the law or answer the whole of the argument projected into the cause by the briefs. We shall content ourselves in the statement which here follows by limiting it to such facts as are, in our opinion, sufficient to an adequate understanding of the cause and potent to our decision, and shall in our opinion touch only upon such legal questions conclusive, in our judgment, to determine the rights involved upon the facts so appearing."

On July 9, 1927, the original bill was filed, and on Soctober 18, 1927, the amended bill was filed, and on March 9, 1928, a supplemental bill was filed.

all of the defendants interposed a general and special demurrer to the bill, the smended bill and supplemental bill, in which several demurrers it was averred in substance, inter alia, that the complainants had not stated such a case as

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## Opinion filed Jan. 2. 1930

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in July 9, 1877, the original dili see filed, will in 1975, the edenied bill see filed, and on a 1976 ', 1878, a supplemental bill one filed.

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entitled them, in a court of equity, to any discovery or relief, etc; that the amended bill was multifarious, and that complainants had not made out any title to any of the relief prayed.

On Movember 8, 1938, all of the desurrers were sustained and the complainants electing to stand by their said bills, the same and each of them were dismissed for want of equity with costs, sto., and complainants bring the record to this court for review by appeal.

The errors assigned and argued are environed within the assignment that the chancellor erred in sustaining the several demurrers and in dismissing the several-bills above recited for want of equity.

Note that throughout the pleadings the dates and most of the sums of money sentioned are made under a videlicet.

In the several bilis it is averred inter alia:

That on January 2, 1905, the complainant, Millard M.

Powers, and the defendant, Arthur N. Fowers, under the firm name of Arthur M. Powers & Co., embarked in an enterprise to build and operate one or more hydro electric power plants in Kankakee and Will Counties, Illinois, on the Kankakee Miver about 15 miles below Kankakee, and with the purpose of acquiring and operating electric, gas and water plants supplying local requirements in certain of the environing municipalities, and to acquire, construct and operate public utility properties and interurban electric railways favorably located for consumption of such generated electric power.

In September, 1908, the foregoing partnership employed one of the complainants, Wilbur F. Fowers, as a civil engineer,

entitled them, in a court of equity, to any discovery or relief, etc; that the exended will was multifarious, and that sumplainante had not under out any title to any of the relief prayed.

On sevender 8, 1928, wil of the demorrars were auxitalized and the completents electing to stead by their sold bills, the name and ends of them very disalated for mant of equity with courts, etc., and completents bring the record to this court for review by appeal.

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of Arthur S. Fowers & Co., embarked in an enterprise to build
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and operate public atility properties and intervent of section
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electric power.

In September, 1909, the foregoing partner tip explayed one of the complainants, whilese the complainants, while the complainants will be a complained to the complainants.

and aside from the payment of his fixed salary, he was to have a one-fifth interest in the enterprise. This one-fifth finencial interest was fixed by an agreement between the said three Powers in February 1907, and that in accord therewith from September 1908 until February 1911 said Wilbur F. Powers gave his whole time to the Power firm, as civil engineer.

That between 1905 and 1909 the Powers firm \* at great labor and expense acquired equipment, maps, plats, profiles and engineering data, including, in 1909, a complete topographical survey of said Kankakee River from the point where said Kankakee and Desplaines Rivers join to form the Illinois River and thence up said Kankakee River for fifty siles to a point where said Kankakee River crosses the state line between Illinois and Indiana; also during said period the Powers partnership secured written options for valuable considerations paid and undertaken to be paid, upon certain lands on the Kankakee Giver running for a period of years (including an option on a so-called David Jay property of some one to two acres and a so-called Church Todd property of some nineteen acres) and upon a water plant and a gas plant, (at a price of \$200,000) and an electric light plant (at a price of \$400,000) operating in Kankakee.

That from time to time "to-wit January 2, 1906 to January 2, 1909", Millard R. and Arthur M. Powers advised Insull of their field of operation and that Insull stated that he was not and would not be interested in any hydro-electric plants or interurban railroads outside of Chicago; that on March 1, 1910, Insull informed Powers & Company that he was affiliated with one Baker in generating or selling electric energy in Joliet, Blue Island and Chicago Heights, and that if the Powers firm entered into operation there, Insull and his associates would immediately

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kill off the Powers firm project and offered to make " a gentleman's agreement" not to enter any fields in which the Powers firm were operating in consideration of a reciprocal agreement by them not to enter Chicago Heights or any portion of the field in which Insull was interested and to give Insull the first opportunity to purchase any excess electric energy generated pursuant to said firm's project and not required by them, which offer and proposed agreement said Powers firm then and there accepted and agreed to; that about June 1911 Powers and Company closed a written contract with Spencer, Trask & Company, bankers, by which it obligated itself to purchase from Powers and Company, at minety per cent on the dollar, \$10,000,000 par value bonds of Illinois Light and Power Company organized by the Powers January 6, 1910; that shortly thereafter, on to-wit; June 15, 1911, at the City of New York, Insull learned of the Trask contract, and thereupon he then and there unlawfully and fraudulently entered into a conspiracy with one Gwyre ("whose full name is unknown to your orators") and others unknown. unlawfully and fraudulently to prevent Powers & Company from carrying out and successfuly prosecuting their project in whole or in part; that pursuant thereto on June 16, 1911, Insull indused one A. S. Maltman to sell to him the electric light plant operating in Kankakee upon which the Powers Company had an option of purchase, for \$1,300,000; that thereafter on June 16, 1911, pursuant to the aforesaid conspiracy Insull and his co-conspirators unlawfully and fraudulently induced the owner of the gas plant at Kankakee (whose name complainants do not recall), from whom, as Insuli then and there well knew, the Powers firm had a legal and binding option of purchase, to sell the same to the Public Service Co. of Northern Illinois for \$300,000; that on June 17, 1911, in the line of such conspiracy

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Insull informed Spencer, Trask & Company that he had acquired said gas and electric plants, and "as your crators are informed and believe and charge the fact to be" that Insull would be the financial ruin of Spencer Trask & Company if it proceeded in any manner to aid the Powers firm's project; that Insull well knew that those gas and electric light plants were necessary and an essential part of the Fowers project; that their ownership and control was part of the terms of the contract with Spencer Track & Company, and that the same would have been a source of large immediate income, \$75,000 per year, the largest source of income to cover carrying charges during the period of construction; that by reason of such conspiracy upon the part of Insull, on June 18, 1911, Spencer Trask & Company refused to proceed further with the performance of their contract to sell the \$10,000,000 of bonds above mentioned, to the damage of the Powers firm of \$1,000,000; that on August 7, 1911, Insull promised and agreed to purchase from complainants and Arthur N. Powers, in consideration and settlement of the injury and damage wrongfully done complainants and defendant Arthur N. Powers, "or said Illinois Light and Power "o." or such other corporate entity as might be created by the Powers firm for such purpose, all of the electrical energy generated at said proposed hydro electric plant for fifty years and pay therefor a price less than the cost of steam produced electric energy, which would produce earnings sufficient to yield to the owners a fair. just and reasonable return upon the money required to be expended and invested in the site and in the building of the hydro-electric power plant and agreed promptly to reduce such agreement into a written contract, so that the Powers firm might use such contract as a basis for financing construction of the foregoing plant; that Insull would not interfere in the

lasti informed Ependor, freek a Souping the be bed soquired anid gos and electric plants, and "we your arrives are informed ed bin light find "of of opel eds agreer bee evelled bus the firmulation of dependent the same and interested the liural fest (foogare e'erit eroron out bir of remane were at with wine to Adail Sirtosis has any seval fade went lies necessary and un escentics that the sear states that SHELT WHITE WHITE SEL CODITOL TO POST OF THEMS OF THE CODITION nich Spencer Trank & Company, and that the a me would have a source of large immediate isocat, \*75,00 or year, the and the control of theory to dover restring designs the control pariod of consurvation; this by " was at ruch consistey vuon the part of insul, on dues ld, lvil, camer itself a longuing registed to exceed the first with the partocal to exceed to squart sit to them share would shoot be at the and also of figure , list by the set of the plant of the figure of the arealeed be the the commence of the companies and the best the second Famers, in acception which are artiferent of the injury and damage areautility rear completion as a telephone of the an Adaesa, "ex a 16 listaber and the back to one and the home tole while areset the go interest of region of yether to be with the best to Last. To the solitor and apartical actional and to the program mydru soluv it it is a see alle all seed, odroch company त्राहर , मृत्राहर एक वाल्यांचे १, घडेला । या छत्र । एक कुछ्छ वाले क्रांसी रहकार्य would produce a waing sufficient to plaid to the court for so of the own that the confidence of the control of the same ear to the control of the base of the base of the control and the where non in out gifgoury because her thering through pitteris-pubye agreement into a written darker de, so the tre sear lare to the subject of the contract to be the contract to the contr the foregoing plant; the lawer read are referred as financing, building, development or operation of such plant by the Powers firm.

On August 10, 1911, in reliance on the alleged contract of August 9, 1911, upon the suggestion of Insull, Forers & Company, at a cost of about \$20,000 directed Sanderson & Porter, engineers. to report necessary engineering data to determine the cost of the proposed hydro electric plant, and to secure options upon further purchases of lands necessary in the erection and operation of the aforesaid plant. About the same time the three Powers took up the matter of the preparation of a formal written agreement with them on the one hand and on the other one Buell McKeever, who is alleged to have been the attorney of Insull. On June 1, 1912, Sanderson & Forter completed their report, which was submitted to Insull; that in May, 1915, there was submitted to Insull another detailed report with estimate by Sanderson & Porter, of the cost of the proposed hydro electric power plant, prepared at the expense of the three Fowers, which was done at the request of Insull, after the saking of certain borings and maps prepared by complainant Wilbur ". Powers in about 1914; that the relative cost of hydro electric power and coal produced electric power in 1912. as indicated by the report of Sanderson & Porter, was not substantially different, when on August 9, 1911 Insull made the averred contract of that date; that commencing in 1914, except for a short period of six months in 1913, when there was a sharp decline in the cost of coal, the relative cost of coal-produced electric energy had steadily increased, and the cost of hydroelectric energy had declined during the times mentioned in the bill; that during the same period it is true that owing to general conditions, cost of labor, material, etc., the actual cost of hydro electric power had steadily increased, while at the same time the cost of coal produced electric energy had

financing, building, development or operation of evon plant by the Powers firm.

On August 10, 1811, in reliance on the lieges contract of August 9, 1311, upon the suggestion of insull, for era & domesny, at a cost of about \$80.700 directed Panderson A 'ortor, comingers. and the second endertage enting date to determine the open of the proposed bydro electric plant, and to secure ourloss upon further pareliance of lands necessary in the erection and coer that the stardmaid offunt, about the mame time three covers took up did to restant united as to not the contract of the contract o those on the end hand and on the other one cuall Honesever, and is allaged to have been the acturney of frault. On June 1, 1919, Sendermon & Forter completed their return, which all stimpleted to insult; that in May, 1915, there was submitted to insula coother detailed report sit estimate by anderson a corter, of d betagen , taric needs citionale public beesgon, edd to deed edd to feed to with a first powers, within the same as the first said to sample off ve barrage the entire of certain bordays and seek by dece evidilar and that the coor of whole a restrict occupationed . Simi at reser of ricele faction. Less has reser sintuit orbid to as indicated by the r port of .esteron & Forter, we not subaskatiliz different, ober or aller of interest of averyod confract of thet detat con which in 1914, well iar a shart pariod of air are months in lili, when their was - clare decline is the cost of coal, the initity coat of non-criminal electric sacray had sicocily increase, the the cost of heart elegate energy had decitated during the tit weekt the decitation es miles toda first at the bolton more and milest south south filled I all sond those, there, metrical to you and the con and the control of the contr te slice the richt glaber had seem the order as the contract as the second bid circuit civicate of social products alcording the district bid.

increased more so; that on August 9, 1911, and at all times since, as mentioned in the bill, there has been an ascertainable price of hydro electric energy less than the cost of steam produced electric energy, which it is averred could be paid by Insull to the three Powers for the electric energy generated at the hydro electric plant, which would produce earnings sufficient to yield to its owners a fair return upon the money reasonably required to be expended and invested in the building and operation of said hydro electric plant; that by about January 2, 1913, all of the engineering data, furnished by Sanderson 4 Porter at the suggestion of Insull, was prepared and available, and the memorandum of agreement had been completed and approved by Buell McKeever, except for the insertion therein, when definitely determined, of the exact price to be paid thereunder for hydro electric energy; that thereafter in February, 1913. the capital stock of the Illinois Light and Power Company, which had been organized under the laws of Illinois by Powers & Company about January 1910, was increased to \$1,000,000 and Forers Company was authorized to issue \$2,500,000 long time bonds. contemplated to be sold to raise additional funds to construct the hydro electric plant; that on June 1, 1973 in the course of Millard R. And Arthur N. Powers' activities in procuring additional options on additional land, it came to the knowledge of Millard R. and Arthur W. Fowers that Insull, pursuant to an alleged conspiracy, had permitted one Charles a . Monroe who had joined the conspiracy to engage in unlawfully and fraudulently attempting to induce owners of land necessary to the construction and operation of said hydro electric plant, to violate such owners' legal options to complainants and Arthur M. Powers, and sell their lands to the conspirators or some of them; and Charles A. Monroe, pursuant to such conspiracy

lacroneed more so; that on August 8, 1311, and at all times since, as sentioned in the bill, there has been un uncertainable price of hydro disetric energy less than the cost of steam produced electric energy, which it is averred could be putd by Insull to the three Pewers for the electric energy generated at the hydre electric pleat, thich would produce carnings oufficient to plaid to its owners a fair return woon the seasy resedually -required to be expended and invosted in the building and opportunity ation of said hydro electric plant; that by about January 2. 1913, all of the engineering data, furnished by conderson & forthe at the suggestion of Insuit, were prepared and avaitable, bevore t bun beit name and had inscreazed to authunapeen adt has medy thereat makingani ent tol igeore, revenied Llaud you rebuilted determined, of the cases orice to be made this thornwants for hydre steerlie energy; that thermores in February, idia, the capital stock of the Lilinois Light and Power Gementy, which had been organized under the less of Lilnois by forers & Company deept Jemmer 1910, was increased to .1,000,000 and Property Company was authorized to issue 1,200,000 long time bonds. continued to be sold to rater additional funds to constitue the hydro electric plant; that on June i, elect, in the course of Miliard 11. end arthur R. Fowers' notivities in producing of Milard A. and Arthur H. Fowers that Insull, persuant to an alleged equationer, had parel thed one therite . Touries wie had joined the conspiracy to engage in universally and fraudpleasily attempting to induce owners of iand necessary to the construction and coerciton of said hydro elecated plant, to violate such concern legal options to conjuntament of the E. Forers, and and their lands to the monepartitions or send of them; and Charles A. Monroe, pursuent to such conspiredy

unlawfully and fraudulently induced the owner of the David Jay property under option to the complainants, and the owner of the so-called Church Todd property, also under option to the complainants, to sell the properties to the conspirators or some of them; that about the same time, pursuant to such conspiracy they caused to be represented to other owners of other similar lands, also under legal option to compleinants and Arthur N. Powers, that if they would not break their options and sell their lands to the conspirators, Insull would not permit the construction or development of the hydro electric plants for at least ten years; that on August 9, 1913, Insull promised Powers & Company that he would cause the Jay and Todd properties to be immediately conveyed to the Illinois Light and Power Company; that up to July 10, 1926, however, such had not been done; that on August 9, 1913, it was represented to Insull that the agreement prepared by McKeever contemplated a 50 foot dam, and that Insull approved the erection of said dam pursuant to the alleged conspiracy, and represented that before determining the price for hydro electric power to be paid by Insull and executing the aforesaid asmorandum of agreement, Insull desired to consult further with the engineers; that from August 9, 1913, until some time in December, 1913, active prosecution by Powers & Company and the Illinois Light and Power Company of the building of the contemplated hydro electing plant at Kankakee consisted practically wholly in efforts to bring Insull to the point of finally approving a definitely fixed and determined price to be paid by Insull for such output of said plant, and executing an agreement pursuant to the agreement of August 9, 1911; that during the aforesaid period Insull, pursuant to the alleged conspiracy, was from time to time putting off the complainants on divers excuses for the purpose, by such delays, of depressing

uniantally and fraudulantly infineed the event of the 2 vid day property duder uption to the complainests, and the court of the ec-called Thursh Todd graperty, also cader option to the neaplainants, to askl the properties to the completence or page of them; that chest the same time, parament to sant conspiracy ratical radio to execut radio of hadronevers ed of beens vedi lands, also under legal option to comp. inents and arthur E. right list the the antico which their options and the their lands to the comspirators, Insull would not parent the constructass is not development of the bydye siested plants for action ten years; that an Apport S, 1913, lancil premised backra Company that he would cause the let and Tody properties to be insodiately conveyed to the Hithois Light and Freez Company: what up to walk 10, 1866, herever, such and not been lone; that ON AUGUST S. 1915. 15 was represented to light the unser the unserates propered of Hozeever confeminted a 50 foot cam, and that begalls add of tannamo and bias to actions and baveres ilsest conceived, and represented that before determining the price for hydro electric perce, to be p id by Lacula and excepting the afarents semeratum of waremant, insult decire to consult firm . Iti . Stanger mer's the true to itie the true to itie the intil done time in Jedenker, 1913, early prosecution by Powers & dempeny and the illimits while and every Company of the builting of the contemplated by dro aleather along at handaken conclusive To deloc to? Of alread rains of appeals at wilder whenteners so or oping really stob bar benil glanishing a galverge glimail or in the for such outer ture the the fact accounting surveness overment to the expensive of suggest 6, 1811; but Days the sic sit of thempress there is the first of the sit and the contract of conseptency, owe from thee to whee gutting off the completents on divers evenues for the purpose, by such delays, I depres tos

and adversely influencing the minds of complainants and arthur N. Powers successfully to prosecute said enterprise, and thereby induce, onjole and force complainants and Arthur N. Powers to sell out their interests in the premises to Insull at a small percent, vir., five per cent of the actual value of the same; that on December 15, 1813, complainants and Arthur N. Powers, in reliance on Insull's promises, had practically exhausted their available funds other than the expected proceeds of a contemplated \$2,500,000 issue of bonds by the Illinois Light and Power Company, and sundry purchase price payments upon various lands previously contracted for by Powers and Co. or the Illinois Light & Power Co. falling or past due, and that these and other pressing obligations of the co-partnership were pressing the Illinois Light and Power Co. into serious financial embarrassment; that Insull's promises and the formal agreement in accord with his contract of August 9, 1911, failing to materialize, Millard R. Powers, on December 15, 1913, appealed to Insull on behalf of the partnership and the Illinois Light & Power Co. to give the necessary directions and cooperation required to complete said agreement, and in default of the prompt completion thereof to loan the partnership or Illinois Light & Power Co. a sufficient sum to relieve the financial embarrassment and protect purchases of land and enable them to make such further purchases as they might find necessary; that Insull . replied he could not command the funds necessary, but that if Hillard R. Powers could show Insull the way to provide such funds, Insull would furnish \$100,000 more or less, for such purpose; that thereupon on December 20, 1913, Millard R. Powers arranged with the Central Trust Company for a loan of \$100,000 secured by the note of Millard R. Powers and Arthur M. Powers. payable either to the order of Insull or to the order of

and salversocky influencing the minds of occopiation and arthur M. Posers successfully to presente send enter vise, and thereby induce, emiple and force completences and arrhor M. Poroce to suit out their interrets in the present to Insuli to select Lector tive per ment of the actual value. the same; that we decreber 12, 1913, complaining and arthur ! Posess, is relience on Insult's promisee, but providenty exhausted their everilable flunds other than the expected proceeds scontill adv to shoot is seen OCC. COC. St batalquetocs o ic Light and Fower Company, and mindry purchase price payments upon various lands previously dentifieded for by Forers and Co. or the litting a light & rower we. for the or was due, and that these had other present collegations of the commerciality were every the all three life of the second second and the second learnt out has been could a limb ; and the content of the learning agraement in accord with his contract of reguet B, 1914, falling to materialise, whiterd a. Powers, on Georgium 13, 1913, apported edgi, clostill of the gravery a eds to linded as lived of & Fower do. to give the accessary directions and cooperation required to complete said agreement, and an default of the promot deall sicultic an cideromine wet and of leareds molicipate A POWOT LO. A SHATLOISHE SEE TO TOLLIVE THE FIRE OF I CHEOTY SEeden of usus sideon last lan. To benedetan tootes has then such further participate as they regard fire acceptant to a regular replied he could apt commend or or the think has the the Misland of Powers oweld show from it was an every of the bush with fands, landik would furnish \$100,000 were ur lear, for angh purpose; that thereupon on becommer No. 1917, Billand . course COL 1.17 TO MODE 1 10) YHIN EDG 5 WILL EASTED BUT METER DOMESTEE secured by the mate of milling to brown and return ". inverse To robro wit of to linear to rebro out of taggin oldering

themselves and by them endorsed and delivered to Insull with the entire \$1,000,000 common stock of Illinois Light & Power Co. and \$2,500,000 par value of bonds; that from time to time thereafter commencing December 30, 1913, and ending March 23, 1916, Insull advanced on the security of the last aforesaid capital stock and bonds, the sum of \$137,526.29; before the last mentioned amount had been disbursed and about the middle of 1914, Insull advised Millard R. Powers to limit payment or investment in lands on account of general financial conditions, but he then and there approved a proposal to go ahead with certain borings for determining foundation conditions at the proposed site of the hydro electric plant, and commencing August 1914 and ending May 1915 the foregoing was done by Wilbur . Fowers, and the report of Sanderson & Porter submitted to Insull about May 25, 1915, but that Insull never got to the point of finally approving a definite and fixed rate per kilowatt hour to be paid by him under said alleged agreement of "ugust 9, 1911; that the foregoing report of Sanderson & Porter was presented to Insull May 25, 1915; on June 15, thereafter, insull pursuant to the alleged conspiracy, represented to Millard B. Powers and Arthur N. Fowers that he desired and insisted upon a further report of other engineers, and that Insull under date last mentioned employed the engineering firm of Meade & Seastone, of Madison, Misconsin, to check up Sanderson & Porter's purported reports and data, which they proceeded separately to do, and in September 1915 they presented an unfavorable report as to the output of the proposed plant "and consequent ability or inability to there produce Hydro electric energy at substantially less than the cost of coal produced electric energy, basing their conclusions upon a disagreement with the data of Sanderson & Porter as to the actual flow of water in the Kankakee River at the proposed site" of the hydro electric

thewarders of briselist bus beerobne modf of bus seviousedt the entire (1,000,000 dosman stock of Hilmold Hight a voter Co. - T if only of sair work lift abnes to sulry tag 900,000,81 bra affer commencing weember 30, 1912, and ending March 73, 1916. Lerican flowers and and to the courter of the feature alient steed and bonds, the aus of \$137,586.88; before the Last acritioned assunt had been disburged and about the middle of lelf, incall advised Millard A. Fowers to Mait or years or investment in lands on account of general limencial conditions, but he then and there approved a propert to go abend vith certain vortage for determinant foundation on ditions at the proposed sire of the hydro electric plant, "nd of eatering August 1814 and entire may 1918 the foregoing are lone by "liber". owers, and the report of Sandarson & Porter substitute to lacult cloud only 25, 1815; a gairorne will and to the coint of to rever lives sadt but definite and fixed rate pat billow to hour to be paid by him under walk alleged "greeneer of "wane" ", 1911; that the foregoing talet . W. You itwent of bedressig ass retro" & moorebest to freque on dune 15, thereafter, traull pursuant to the distant encountracy, represented to Fillers ". . overs "nd .. there is beine exper desired and ingusted muon a further recet of energeous, and that Inpull under lite last sentland evoluged the this last Tire of Monde & denatone, of Wadison, "ixognain, to check ac Sanderen & Porter's purported reports and days, which they proceeded separately to de, and is supersed till a repeated ball tasi. Pamilost ach le suddina ads es an exalist esquatestes as otraceit orbyg sound to energy or thilldent to willide theupeango be in any lead to rest out rear each galetterstadus de quesas electric energy, basing facil conclusions upon a distancement retire to be in it footer of the retro a correct to the country the state of the of the manual art for "after proporty and to rowed somewhat wife at

plant. On receiving the report of weade & Seastone, Insull advised Millard R. Fowers and Arthur N. Powers, and the Illinois Light and Power Company that in view of said report he did not see how he could go on with the plan to construct and operate the proposed hydro electric plant on the Kankakee River; about ". Powers rechecked the Mende & Seastone report and found that they were in error in questioning the data of Sanderson & Porter, and that the report "was based upon mistake, oversight, carelessness or misintention"; that on October 16, 1915, Insull conceded that the report of Meade & Seastone was erroneous. From October 16, 1915 until December 15, 1916 Illinois Light and Power Company and the Powers partnership continued to prosecute some details of construction of the hydro electric plant, and Insull advanced the sum of \$8,000, which was a part of the \$137,536.29 last mentioned; that while Insull conferred with Sanderson & Porter and others from time to time, no apparent progress was made in getting Insull to the point of definitely fixing and determining the price to be paid for hydro electric power to be generated at the aforesaid plant, or to execute a formal agreement covering the alagged contract of August 9, 1911; that on December 16, 1916, Millard M. Powers, on behalf of the copartnership and the Illinois Light & Power Co., demanded of Insull that the formal written agreement be promptly executed, and then and there proposed to Insull that in default of so doing Millard R. Powers would refund to Insull the money secured by the capital stock and bonds of Illinois Light & Power Co., and seek elsewhere a customer other than those being supplied by Insull or the Eublic Service Company for such output of the aforesaid plant; that thereupon Insuli, pursuant to said alleged conspiracy, declared to Millard R. Powers that he would regard any tender of payment of the aforesaid sum an

plant. On receiving the report of desce & Secripae, Insuli advised Millard R. Fowers and Arthur R. Forers, and the Millingia tight and Forest describe to wate at that yespect need beattiet served has fourtedoo of usig and dila no on himos of nod age the proposed byers electric plant on the Eunkases Miver: about the Powers rechecked the Boads & Seastone repart and found that they were in effect the questioning the date of danderoon & lovier, and that the report "was based upon mistake, oversight, caretes ness or misintention't that an Cotebes 18, 1818, Insuli conceded that the respect of Mande & Wessiane was erronesse. From Coteber 1.6, 1016 until Decomber if, 1918 illinois tight and Power Joness and the Pewers partmenthip, continued to proceedte seem downis of penetruction to mue and hecourts ilused here study cirtails orbyd and to \$2,000, which were a part of the '137,000.50 inst mentioned; that mult supply and which supply a poster of the supply and order with time to time, no reparent programs and and in inthing Incoll to the point of definitely fixing and talercian the prior to be paid for hydro electric power to de accordent the alorestic. bangalis and prilingent inferences Laurent a strongs of to justin contract of August C. Lall, that on Secender lo, 1918, Miller of M. Forers, on behalf of the congressing and the Tillnois thebt & Pagar Co., Cashalad of Ingull that the formal eritton agreenest be preaply excoused, and then and view warecest to Incult that is default of so daing willers we have to refund to freakly closelli la cheed las loste futtion est ve betopes venos est Light & Frent Go., and each cinerater a contoner other than those being supplied by Insuli or the Sublic Cerrice does my for such output of the eforeseld plant; that thermove levals, through to said wileged conspiracy, deciared to militard M. . covers tone he rould regard any tonder of payment of the aforesoid am an

act of hostility and in the event of such tender would immediately proceed to purchase all lands in or about the site of said proposed plant and thus, and otherwise as he might, prevent the erection of such plant: that on December 17, 1916, Willard R. Powers again urged Insull that in default of the promised formal written agreement in accordance with the terms of the alleged agreement of August 9, 1911, Insull accept the repayment of the sum last mentioned, and thereupon Insull pursuant to said alleged conspiracy stated that he would not permit the payment of said last mentioned sum unless said co-partnership would first contract with Insull and the Public Service Co. on such terms and at such rates for electric energy as Insull might dictate, in which event he would accept in full payment of said \$137,526.29 an issue of \$150,000 par value 6% junior mortgage bonds of the Illinois Light & Power Co., the same being subject to an existing issue of \$350,000 par value five year 6% first mortgage bonds of said Illinois Light & Fower Co.; that on January 15, 1917, Millard R. Powers continued to insist that either Insull promptly perform his agreement of August 9, 1911, or permit the repayment to Insull of the last mentioned sum, "step out of the picture" and leave said co-partnership and Illinois Light & Power Company free to pursue construction and operation as best they might; that on January 27, 1917, Insull, pursuant to said alleged conspiracy, wrote Millard R. and Arthur M. Powers:

some good substantial people like Messre. Sanderson & Porter to take hold of the project and push it I certainly have no objections. Moreover I am willing to aid the development of the project by them; or by other equally reliable and friendly persons by causing junior securities to be taken upon some terms mutually acceptable for the loans heretofore made to you, provided I can reserve, in some satisfactory way, an option to acquire the property upon some reasonable basis if I should hereafter desire to acquire it."

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Between February 1, and April 1, 1917, Illinois Light & Power Company, Millard R. Powers and Arthur N. Powers entered into negotiations looking to immediately raising sufficient moneys for said hydro electric plant, including the purchase of additional lands in its neighborhood, and to the sale of power or the bulk of the power to the Illinois Central Railroad Company for their use in operating suburban trains electrically; that in the course of said negotiations, arrangements were effected whereby a sum of \$250,000 was deposited with the Chicago Title & Trust Company to the account of Arthur M. Powers for the use of the Illinois Light & Power Company for the purchase of additional lands in the neighborhood of the hydro electric plant; thereafter on April 3, 1917. Insull learned of the deposit of said \$250,000 and thereupon, pursuant to such conspiracy, notified and directed said Illinois Light & Power Co., Millard R. and Arthur N. Powers to proceed no further with the financing independent of himself of the proposed hydro electric plant, and that Insuli would proceed in accordance with the alleged contract of August 9, 1911, and in accordance therewith would have prepared a draft of electric service agreement providing the Public Service Company or other company controlled by Insull would purchase all of the electric energy generated at said plant at a price satisfactory to complainants and Arthur N. Powers; that said Illinois hight & Power Co., complainants and Arthur N. Powers, pursuant to the last direction of Insull and in reliance upon his promises, abendoned all plans and activities for the financing of said proposed plant independent of Insull, and accepted Insull's renewal of Insull's agreement of August 9, 1911; that thereafter until about December 2020, Insull delayed the execution of the aforesaid agreement under many pretexts, and while complainants, Arthur

Between February L. and April 1, 1919, Things ers c. at Turita, for others at breakling grannet theor & sight sutered into negotiations looking to eccitively anished and actioners for the city of the city of acoust and actions and the city of surchase of additions a code in its not thorhood, and to the isting elimitate our property to dust est to town in these Sallroad Congeny for their use in our cinin cabarons tring electrically; that is the course of said sagethelicus, ser CCC. (eS' le mus e yderede helpolle area sinemegnaria taunen. Die granget teal beithe en eint ent die hettengeb of Arrhur B. Fowers for the tast of the illinit timbe a forer Company for the curcusus of edditional lands in the artichechood of the bydro electric plant; therefter on coric C. 1817, in will learned of the de welt of early fig. de therengon, warming to and companies applied of the confidence of the confidence of the confidence of de comer do., williard to the artists ... comers to prome to further with the financing independent of alternity of the verwe concour time elected to the term and the confidence of the conf accordance with the wilened contract of August 3, 1311, and otifoti. . . Aleman o herricar aves fillow dile. That source and TOTTO TO YELLIND. TOLYOU - TILE TO MIT BEILDIFFER SERBESTEN SELVES citorals and to it we worm bound insuly to saligation to manage -mon of granders - bois a de twell blue to become by the plataura and arthur h. devers; their said lileal. : . . . - crer des la de de de la lacere de la lacere la marenta de marentales de de de la deservición de la deservición de la defenda de la deligión de la deligión de la defenda de la behalfied a training all may conciler at his light to melicrate old plane and settrifice for the finneshme of a id proposed to I same to them. between the lineal to trebusquent thaig lacult's agreement of August S. 1911, that thereafter until about December Edil, Insult delives the exercise of the "fore in agreement under vary pretert, and while countries,

M. Powers and Illinois Light & Power Co. were so kept waiting upon Insull, Illinois Light & Fower Co., complainants and Arthur N. Powers fell into default as to the arrangement under which the \$250,000 had been deposited with said "First Mational Bank", and on June 1, 1917 the depositors thereof withdrew that sum; that among other means and osuses of delay during the period last aforesaid, was a demand by Insull, pursuant to said conspiracy, of an inventory by Sanderson & Porter of all the property, real or personal acquired by Arthur N. Powers and Co. and said Illinois Light & Power Co. for and in connection with the construction of said proposed hydro electric plant; that the preparation of such inventory required many weeks of time and was finally completed September 1, 1917, and showed a then cash value of real and personal property of \$438,004.75; that in reliance on the aforesaid alleged promises complainants and Arthur H. Powers had dropped all negotiations in the matter with Illinois Central anilroad and as the result thereof and their aforesaid default touching the deposit of said \$250,000. were then and indefinitely thereafter, for five years, in no position and unable to any practical purpose to resume negotiations with said railroad of all of which facts and circumstances Insull was fully advised, and on January 2, 1917, Insull in pursuance of said conspiracy, offered to purchase of complainants and Arthur K. Powers the entire assets of the co-partnership and the Illinois Light & Power Co. of the value of \$238,004.75. for \$80,000, which offer was refused. Thereupon Insull again resumed "the stalling process" and caused to be prepared agreements from time to time, none of which specified the price to be paid for the electric energy generated at the aforesaid plant; that at least one of the last mentioned drafts gave to Insull the right to purchase the plant at the end of five years on the basis of net earnings of the plant for that period, and then

The forest and Lill at the company of the party of the state and the state of the s epon inmile, illinois light & lower Co., complainings coderthur R. Povere fell into default as to the irenament or err I would that the dear description and but the the the state Bank's and an lune i, idly the impositors thereof attender Contrate guind he econom bas races recto que a dant teme sudt sucurant, ligarity, harmon a a ritiserate fear boires eds to sitt conspirate, of an investory by I aderon & orter ar and the property, in a personal accorded by training and the court upon at bus not to. hower it regic steadill bird has to bos to much the control of well processed the section of the control o tion and was finally non loved applicable is 1927, and areas a them camb withe of tend now normal pro- fire if 436,000,96,96; shal in religious on the offerencia title of the good assumplied and Tetore and at amoltalinged it be goth but event. . Third bar "Lath Illinois "aniinl "Lalin a and the fee real is an employed the thour alorsable defenit topobler the descrif of asid (TEC, U.) where then the sadering the contract of the rost of the years the man tions with rold real good of all of ease follow his attention to the Invall sis forcy .. wheel, and on I morey i, 1917, include an oursumed of all conviltues, our rod in curanes or coul. in the and extens u, lowers all watern and the els is the element ada ili ili de la la calanta de la composição de la construição de for 80,000, which offer are refused. Therrupan leading in werend "the stalling process and measure to be great and apprecior out, and institution dold to enan , and of onte mout chans Light to the address boncing as twee of to the same to the the right to purchase the purch at the one of fare years on the

included arbitrary and unreasonable provisions calculated to unjustifiably cut down the earnings of the plant; that in August 1917 the United States entered the World War, following which and until Armistice Day, Insull recurringly used the fact of the war as a reason for his taking further time in arriving at definite arrangements in the premises, insisting that it was highly undesirable to proceed with the enterprise until the termination of the war; that about Movember 1918 Veva Powers, former wife of Arthur N. Powers, instituted suit in the Superior Court of Cook County, against her former husband, the Illinois Light & Power Co., Millard R. and Milbur F. Powers, and Insull and others, to foreclose upon the interests of Arthur M. Powers in the common capital stock of Illinois Light & Power Co., theretofore on April 1, 1914, assigned by Arthur N. Powers to Millard R. Powers as trustee, to secure the payment to Veva Powers of \$150 a month alimony for the life of said Veva Powers, or until she should remarry; that from November 15, 1918 until December 20, 1930, while Millard R. Powers had a number of conferences with Insull, Insull postponed further action on his part on the ground among others, of the pendency of the last mentioned suit.

That in the Powers' divorce suit the wife claimed a lien upon the stock of Illinois Light & Power Co. in virtue of a contract dated March 28, 1914 between her and her divorced husband and Millard R. Powers, which assigned to the latter in trust all interest of Arthur M. Powers in such capital stock to secure certain provisions by Arthur M. Powers for the support of Veva Powers. In that suit Veva Powers contended that as against her, Millard R. Powers was estopped to deny that Arthur M. Powers was the sole owner of such capital stock, and in said suit by consent of the parties the court so decreed; other contentions

included arbitrary and unreneousle provintons reladite to unjustifiably out down the carmings of the cleat; this in August 1817 the United States entered the World over, fullering which and until atmictice Day, Tenuil recurrianly weed the foot naturary at east redsul paints aid not nesser a es aus ed te at definite arrangements in the premiers, insisting that it was ighly underlyable to proceed with the enterprese unit its termination of the war: that chout weverber 12.8 years. former wife of Arthur a. Fowers, instituted upit to the dupering Court of Cook wounty, egainst ber former husband, the illhuois Light & Power Co., Willerd to and Wilber . Fowers, and limit and others, to forenloss upon the interests of tribur a. Powers -ernds ... the common organist to the a contract of the common ods at before on aprix 1, 1014, castened by arthur s. corers to Millert R. Powers as Trusten, to secure the payment to Yeve lowers of sidd a month without for the life of said yeve Powers, or notic che should remarry; that from howenest li, 1818 until occamen 30, 1930, while Millard R. Posts bad a sumber of conferences ads no trace and no moites redtad teams slivent lineal ista ground sampny others, of the rendency of the last mention deats.

That in the Ference divorce out the cife carless a lieu apon the check of illinois dight a lover Co. in virus of a centract dated dared of illinois dight a lover Co. in virus of a centract dated dared of the centract dated in centract dated in centract in the time that interest of Arthur c. feman in centract of the central provint cas by Arthur c. feman discuss for the cupper of Arthur c. feman document of the teneral provint date auth Verm Femans. In the suit Verm Femans document document of the court of such verm contends that the sole court of such espital atoms, while the past of such espital atoms, and in sele outer of such espital atoms, and in sele outer one consent on consent of the particular consents one

between the parties were made and these were settled between them by a contract dated December 21, 1920, copy of which, marked Exhibit A, was made a part of the bill; that between Movember 1918 and December 1920 Insull assured Millard R. Powers that when the differences between Arthur M. Powers and his wife were terminated he would proceed to execute the service contract of August 9. 1911. On Besember 28, 1920, Millard R. and Wilbur F. Powers notified Insull that a settlement had been effected between complainants and Arthur N. Fowers eliminating Arthur from the enterprice and requested an early appointment with Insull; that Insull, either directly or through his solicitor in the Powers divorce suit, was already advised of the negotiations, execution and contents of the contract of December 21, 1920, and on January 2, 1921, Insull, pursuant to the alleged conspiracy, represented to complainants that he was too busy with other matters to state what the rate of compensation for the hydro electric plant energy would be, but that he would direct Sargent & Lundy, engineers, to make the necessary examinations and send the report to him: that he would also direct Buell McKeever to prepare a draft of service contract and advise him as to the proper procedure for releasing Insull's lien on the stock and bonds of Illinois Light & Power Company; that on January 27, 1921 Millard R. Powers. relying on Insull's said promises, secured at an expenditure of \$2000 the promise of the Chicago Title & Trust Company to act as trustee and title examiners in acquiring lands near the site of the hydro electric plant, and arranged with R. E. Wilsey & Co., bankers, for a sale of bonds of the Illinois Light & Power Co. ample for the requirements of such enterprise, subject only to the execution by Insull of a written service contract, and on January 28, 1931, so advised Insull; that Insull promised that as soon as he received a report from Honroe of Sargent & Lundy, the draft of an electric service agreement specifying the rate

mod. altrates bil. fue eren el al bus eigen eren este este esteres est abestes by a spatence dated because 31, 1822, oney of which, warked Exhibit A. wee sade a part of the bill; the detroug Encapear 1918 and December 1300 them! I callled willer about the shee the differences between Arthur o, rowers rud his rife more toralmated be would proceed to produce the pervice contract of currence 2. 1911. On Sesember 24, 1980, Millerd A. and Wilber . Fourte -en; that is that a sattlement had neen effected between -enplotnents and trader b. comers alimination crime from the experprint and requested on early appaintment into Insull: the leadel. eliber direcil, or through die nooletier in the rac passes ault, was pirmig advised of the negativelous, erecution and contends of the contract of secreber bit. 1960, and on commery ?. 1931, Insul, sursound to the alleged apprinting, represented to CONDICTION OF BE ONE LOW LOVE WITH WILL SETTING OF THE PARTY OF STREET which the rest of concension for the hydre elected class energy would be, but that he would direct Dargent & mady, engineers, init of droper our base has anotherinate grosesen our same of The First along three to the Montager to or our along the get armspoord record add of as ald walras has towarden oclares rights slantill to seem but short and no st. at liters and religion a Power Campany: that on J. am up 37, 1981 attract o. . cours. relying on Insmil's sail promised, accured at an extentione of to ot the preside of the while age little & four to the se tratte and thing ex miners in adquirin, inche per the elter of the byder electric start, are arranged with H. T. wilsoy A . . . bankers, for a male of bands of the lightons right a er T ye. saple for the see dreathe of such exterprise, employ only to the execution by Inquit of a witten acryica control, and un Junuary 28, 1931, so advised Insul; the last to lost that that as soon as he received a repert trop touror of terrent a tuning. the draft of an electric service and entering the rate

to be paid for electric energy sufficient to meet all financial requirements and yield a reasonable profit to Illinois Light & Fower Company would be prepared and be available for reference as a basis for financing the purchase of necessary lands for said proposed plant through the co-operation of Chicago Title & Trust Company; that in the meantime and unknown to complainants until May 5, 1927, Insull was scheming and deviaing to play complainants against Arthum 5. Powers and cause complainants to fall into default to Arthur N. Powers and other parties in interest in the premises, so that Insull might eliminate complainants from the enterprise and acquire their interests for little or no consideration. Complainants state on information and belief that with the aforesaid end in view Insuli solicited and induced Arthur M. Powers to violate the last mentioned contract and enter into negotiations with Insull contrary to the provisions of the contract of December 21, 1920, requiring that he should refrain from interfering with or embarrassing complainants in their efforts to develop the hydro electric project on the Kankakee River, and Arthur B. Powers represented to Insull that if complainants could be put in default and the interests of complainants forfeited to him or otherwise disposed of, Insull could deal with Arthur N. Powers more favorably to Insull than he could deal with complainants, and on January 21, 1921, Insull and Arthur N. Powers conspired together to lead complainants to rely on Insull and his promises until they should be brought into pretended default to Insull or other lien holders, so that Insull might be enabled to terminate the interests of complainants in the premises and same might be forfeited to Arthur H. Powers, so that the latter might be able to secure from complainants, A.E. releases of complainants' interests in the premises, as that on May 4, 1921, in the suit of Veva Powers against Arthur N. Powers,

I will as a set of antima the quanto office to bing od of 4 . J. bratili of file of sla preser a blaig bar sansasti. par For F Total Company totals on prepared to be true black to the company to the com as a besis for filmenting toe curvesse of acceser teller is with a sife Bo said risgowed but danced their become also & Fruet Lierary; the bis abs as areas and all ages to low it in the write of goldier be guidest the lines' , TSEL , B y k litter complainents applies irthes I. learn and run complainents to fail inte defoult to Arthur B. (beers would what - retire in interest is the presises, so that insuli sight withhere applicate on to elittle of effected beings; bus estigation off mort consideration. Complete whete we intermedian and patter that he wished by the colored and the view limit in the bisecond of the west with the colored and t ante un grante en con la constante de la const contract of Cocember 13, 1900, respirate that the telephonic for the Troublest say the electronic fire construction and the saint seems and was lar so and seed on bilities to provide only oplowed as samel's River, and arthur a, he has a resent to touch that it -gor to constant in the default and inconstants picinests forfeited to bis or cherrise biscosed of period deal with a reluce a court according to launce or and the late deal sample tempts, and on Juneary 21, 1914, income the Arthur B. . grave consulted together of test outsitates to roll ofor viprost so blooks your little assessed aid the Liveni se pretended definit to leaved or other less helders, so the end all the all agrees to steen that he to steers of baldings ad adala a to . F T. HER of best botto to sage seed to remaine the . The mi wood men't groupe of the ad this test is the or en design of complaints of the casts in the colors, we first our ing 4, 1921, in tes ouit of Yeve Powers against Pitter a. Theres,

Insull and others, a final decree was duly entered finding among other things that Millard R. Powers was estopped as against Veva Powers, from claiming any interest in the atock of the Illinois Light & Power Company. By the agreement and consent of all the parties recited in the decree, it was among other things decreed that Arthur M. Powers and Millard R. Fowers, and Illinois Light & Power Company were jointly indebted to Insull on account of the \$137,526.29 and interest in the total sum of \$193,544.95, secured by the entire capital stock of Illinois Light & Power Co. and the bond issue of \$2,500,000; that Insull might sell said stocks and bonds on ten days notice to the interested parties, and that Insull might release Arthur N. Powers, Millard R. Powers and Illinois Light & Power Co. from the indebtedness to Insull, or extend payment from time to time without releasing the obligation of any of the parties not so released or the collateral. In said decree it was recited. on the facts shown by the evidence and the agreement and consent of all the parties except 0. M. Powers, that Veva Powers had a lien on the 10,000 shares of Illinois Light & Power Co. for \$30,000 with interest from the date of the decree, subject to the lien of Insull, also the lien of Central Trust Company for \$5000; that/defendants other than Insull and the trust company pay Veva Powers within ten days from the entry of the decree \$30,000; that in default of so doing 10,000 shares of the stock would be sold at public sale, subject only to the liens of Insull and the Contral Trust Company; that in the event of the sale of said stock under said decree, any sum in excess of the amount due Veva Powers be paid to Insull and the Central Trust Company, to be applied on their liens, and that any further amount realized from such sale should be brought into court subject to its further order.

Inomil and oth re, a final decise and duty - attent, white, ement other things that Millers a casta das extended against Yeve losers, from oilising any interest in the elect Lit farmenter off We . Temper a complete signification of convent of all the parties recited in the degree, is a apon and illinois light a over Usen or vere jointly independent Insull on account of the VAST, and are interests in the bates sum of 1195,504.36, secured by the entire sightel elect of Illinois dight & roser Co. and the loss thank of ",500,000; solion ever del de stond tot skoote site lies digle livel isd to the intermeted perties, and that insult wishe velous sevenus A. Parera, Killard . overe end Timinia dink + over do. from and of eact of the the contract of the contract of the total of ing pelater and to goe to mortration and garacalar impositiv so released or the call terral. In other decree it the salter. dues in the factor that in the critical and the factor of and of all the parties event . . Parers, that y we targes take Tot to year a famil alociais he sevens CCC. Of sai so seil a os scejde. Portoer sda in elet sit musi inercial dife 000.07 net (2" at live! issues to are, out only, firent to meif add 25000; the translate other team levels and the trust populary pay form losers within the days from the energ of the denise door some to remain Cot. Cl garde on the fluctuation of their cool of e rest, wit or view tos, fue . ours stilling to blos ad block Insula and the instraligues done by the sin the event is the alle of and about mader and decree, by such to an one inc amount due Vers lorers he naid an inseri, had the Jests : - mai Company, to be applied on their liess, and that har fureby a amount er' of the such while which both the broad and thousand hostings further order.

That between December 2, 1920 and December 15, 1923. Sanderson, on the request of Insull and as part of the alleged conspiracy, attempted to buy out Wilbur . Powers for \$5,000 and Millard R. Powers for \$15,000; that in October 1921, Insull caused it to be represented to Millard H. Powers that he required further information from complainants' engineers, Sanderson & Porter, for the use of Monroe, and that the last mentioned '. service contract had been drafted and approved (but not executed) except as to the price to be provided therein to be paid for electric energy, which would be settled as soon as Monroe reported: that during twelve months of the period last mentioned Insull was, or claimed to be, in ill health, and pursuant to said conspiracy, in prentended explanation of the delay, Insull caused to be represented to complainants that owing to his ill health and other demands upon his time, he was unable to give the necessary attention to the matter; that on February 7, 1923, he notified complainants that the matter of the development of the Kankakee River proposition was in the hands of Mr. Sanderson: that thereafter and until September 15, 1924, complainants pursued negotiations with Sanderson & Forter without effect; that by June 4, 1921, Veva Powers, through her counsel, advised Willard R. Powers that it had come to his knowledge, as attorney for Yeva Powers, that Arthur H. Powers was planning to make some claim to the capital stock of Illinois Light & Power Co. as assignee of third parties, or otherwise, adverse to the terms of the decree of May 4, 1981; that to protect Yeva Powers against said threatened claim, said attorney would cause the capital stock of Illinois Power & Light Co., last mentioned, to be sold at public auction under the decree, and that at such sale he would cause the said capital stock to be bid in by Yeva Powers, and that notwithstanding such sale complainants should continue negotiations with Insull under the contract of December 31, 1930,

L. L. : COLUMN SET TO LE TERM . A TEMPSON SERVE regardings, and the end of an end and and are the end are consolater as a secure of the out will max . . eyers for F, And her filera . Fold wasoned of a di the lat reverse . I brailly denied if to be represented to dam. It is overs this to receive threshed information of the companies of company for the use of comment, and then the last continuenlens were son suid berer ha bes resinal and bed so teen beits THE LEAST OF IT BY TOOK FOR NOT THE OF BOST OF OF OR BESTED taste for the sound and the section of the section of the section is livent benefite a feel boixty only to entere eviers gaixed today which hich of your little that the this is an are the continue to became along a led of the maintenance of along an along the drived ille is all garde to it streath upon or boundering ad of and effer denumber once his time, he were unskin to sive the negetianty attention to the writer; cart an intro-y i, lonand to thempoleral and to retran our and administrated and intition Lanksket hiver proposition on a la language of it, interent that thereafter and until her lacker it, 1384, and arthropic jone is lightly thire - metaln ? Whis applicating a boustury that by dury of little tree courts, errors her courts, adviant Alliard d. rowers that it independ on his encounting, as a turner save es paració els esasos. L'assiste s'el esacat avet tol seas oight to the supited store of lilitors it at a serio. as lasigate of the relation, or oth mant, there is the Telegro the tentral of isot if this is to be the bearing and to emission againet init threatened annie, suid ritorner mould o use him capital stook of illiants comer a sight 'o., bust resigned, as estro del a tentra curativa della sella della contra della della della contra contra della contra contra contra equip, evely to the ad of woods in which bees and according to erither activities and execute come of a day and anticipation told has negotiations with lander the content of he wast it, when

and that Yeva Powers would be and would remain ready and at all times glad to co-operate with complainants; that thereafter on July 15, 1921, Veva Powers, pursuant to the decree of May 4, 1921, caused 10,000 shares of the stock of Illinois Light & Fower Company to be sold at public auction and herself bid the sum of \$25,000 therefor, subject to the Insull and Central Trust Company prior liens; and thereupon the Master conducting the sale issued to Veva Powers a certificate of sale, and thereafter pursuant to said master's report a defidiency decree was entered in favor of Veva Powers for some \$5295.83; that on June 15, 1922, Insull. pursuant to the said conspiracy, secretly induced and directed Sanderson to produce from Vevs Powers (nominally in the name of Sanderson and pretendedly for and on his behalf, but in fact for the benefit of Insull) an option of date June 15,1922, upon the master's certificate and the title of said Veva Powers thereunder to the stock aforesaid, said agreement being made a part of the bill as Exhibit B; that contemporaneously therewith Insull in pretended performance by Sanderson to that extent of the option of June 15, 1922, executed and delivered to Sanderson and caused him in turn to attach said option contract and deliver to Veva Powers contemporaneously with the delivery to Veva Powers of the last mentioned contract, a cortain asmorandum of Insull dated June 15, 1922, appearing in Exhibit B. Following the signatures of the parties to said last mentioned contract, which memorandum or agreement is by reference made a part of the bibl; that pursuant to said option Insull became the potential owner of all liens upon said last mentioned capital stock, the holder or holders of which had the sole right under the contract of December 21, 1930, to terminate for lapse of time the exclusive rights of complainants, under said last mentioned contract, to prosecute said proposed hydro electric plant on the Kankakee River.

and the term Poners could a condition the term to To fire of the control of the strateging of being would like on July 13, 1921, Vevi Femers, init to the done of the 1921, awased 10,3% shares of the stock of Illinoi. At the core Commany to be noted the Indian and hereaff his that are of \$35,000 therefor, employ to the tradit and lentric first firs by orier lions; and thereupon the barter confacting the reactive of farming a first line of the paint of the first as a second of To the total and the second of the contract of . Alesant . Tel . of warr, no finis : "B. . will week to be week to be pursuent to the said completed, exactly induced and discoud to we a off the willing man are to a most or now to a see things of Iniderson in . To confedir for any on all cobract, but in lest ned (S. 4), all sout the belief of flight to dike no day to the modern's pertificant and the fitter is all the very opening the term THE TEACH STORE STORES IN A SELECT SHOP SHOPE BOLD STORE THE SELECT STORES OF THE SELECT STOR of the bill as friend of the cost morrosesty correctly in the first of the property of the factor of the first of the first of the aprior of June 15, 1922, executed and followers of tential to introduction bire durits of and at wid beauto bas of there is not the side of the first about the state of the contract of the c and the commentation of the state of the design of the last to dated dame 15, 127 , ap evaluar is writte of failuric vice do de jo ligno territo e fasi of o o difficado fo lo un regista giái lit so iran e anna andariatar od ai anna-eras ta mhadhteadh a c : laireage; it sevo w likel moito bise of anesymmetric fed of the long upon said test mentioned register erock, the to the and and tothe trigger also at high dalah to archiad to replain Describer 21, 1920, to terminate for input of thre to trulauste the state of the contract of the state of th , toy and the seld proposed hydro electric all the selection of the

That the \$5,000 indebtedness to the Central Trust Company was evidenced by a note of William A. Fox, Treasurer of the Public Service Company, and under the dominion of Insull; that on December 15, 1923, Sanderson, under the direction and in accord with the conspiracy of Insull, notified complainants that Insull then and there controlled the market for electric energy within the market radius of the last mentioned proposed hydro electric plant, and had it within his power to ignore the rights of complainants in the premises, but as a matter of good will was disposed to and would pay Wilbur F. Powers \$5,000 and Millard R. Powers \$15,000 for their interests in the enterprise and release Millard R. Powers from all obligation to him, which offer complainants declined to accept.

During the pendency of the aforesaid negotiations Insull through Buell McKeever had reported to complainants that he would not name or agree to a price to be paid by Insull or the Public Service Company for electric energy, unless prior to or contemporaneously with the same, complainants effected the necessary final arrangements to completely construct and put the aforesaid plant in operation, because, as McKeever then and there represented Insull as stating, Insull was unwilling to have any such price communicated to different banks and bond houses, lest the rate become public property and be utilized against Insull or his interests before the Public Utilities Commission of this state; that notwithstanding complainants' protest that the making and offering of such price was actually what Insull had theretofore promised and undertaken to do, McKeever insisted that such was and would continue to be the position of Insull; thereupon on October 15, 1923, and until October 15, 1924, complainants planned and occupied themselves working out and securing deftaite and comprehensive agreements

that the logonal hadebashess to the entert frust too my we evidenced by a cose of thise, . "or, francisor of the molic fervice Coapens, and under the Coapens of family to the Coapenser lb, 1-7", narrayon, near the descript and the rough site the coapens the section at the coapens there can be seried for the time that I will shad the coapens the time the time that the capens the family of the first sent access to the state of the first sent access to the coapens that the capens at the coapens to the coapens of coal all sent disposed to and would pay think the coapens by the coapens and disposed to and would pay think the case to the coapens and disposed to and would pay think the trate to the coapens and coapens there are the coapens to the coapens and release all coapens dealers dealers and coapens and coapens as a socept.

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with R. E. Wilsey & Co., bankers, and responsible contractors, J. O. Heyworth, of Chicago, which included the terms of the undertaking under such plan by Insull and Public Service Company, and thus to meet said pretended objection of Insull to making a price for electric energy in advance of the financing of the enterprise by complainants; that on October 15, 1924, complainants attempted to present said completed plan to one waldo . Tobey, one of the attorneys, etc. of Insull, who told them that Insull was about to enter into a contract in the matter with Arthur M. Powers and would not consider complainants proposals; that between the last two mentioned dates complainants had advised Insull in a general may of their plan as hereinbefore set out; that on January 2, 1924 Insull caused complainants to be notified that he was negotiating for electric service with Arthur M. Powers; that thereafter on February 1, 1934, complainants learned, and the fact was, that said last mentioned proposed agreement under negotiation between Insull and Arthur R. Powers contemplated allowing the latter a period of six months within which to completely finance said enterprise, and provided that if he was successful in so doing within said time that Insull was to have a one-half interest in said enterprise, but that if Arthur M. Powers was not successful, all his interest should be terminated and become the property of Insull, and that in the negotiations between Insull and Arthur W. Powers, Insull represented to Powers that if said agreement was entered into Insull would furnish Arthur M. Powers with sufficient money to satisfy and discharge any agreement Fowers might make with complainants in order to procure from complainants releases of their interests in the premises; that the last mentioned draft of service contract included the specific rate per kilowatt hour to be paid by Public Service Company but contained provisions such as

1 th R. s. - 11coy & Jo., brokers, and tempon this partition as G. G. Peyrossb, of Chieffe, which included the test of the garen, resve tidu tes ilongi es una fore estas gaidetestas the property of the contract o sat complete the remove of the selection of the selection gendd gan ar ar hann of an a Bankingon flend ban o'r o'n of cooleanaidh tions of the most till at a community against the fire and 。 "我只看到了,我想到一个老爷的,你们还是我们的我的人,我们还是我们的,我们就是一个老女的,我们还有一个老女的。" government and service in the service of the servic Incipio ... asymptolizana and il applicano pot tura alla mortano Instal to the period of the control that the test of the same to little od il sanatire occidentata esperimentati esperimentati vassanti so seds that he were negatively for algebra destination with adeption of the ា បាន និងការបានប្រ ប្រក្សាសាយា បានប្រកួតនាមាន ក្នុងក្រ ខេត្ត គឺ សម្តេច និងក្នុង និងក្នុង និងក្នុង និងក្នុង of drifts signification with the telegraph and animalis the first of the freeze was assistanted bits account yistalcace synd to the current that half first presty parch up at intersense a one-balk latering the contraction of the contraction of the contract of the filter as the tractor of the filter and the filter of the contractor. sanding the contract of the contract of the contract of the contract of be treat instill and arthur i. when, into it was represented to rigger illered wind for the two supposence bire to Indi suppor Frailed Leiter B. Fowers with office of managers of the form whether the transfer the state of the state es thather their to beather that Williams more student or teleso at in the resident that the last authors, the arriver ountree thought on a transfer the east official ent denter to the contract of e, but the "electronic bettered the green to solved cilder go

patently to render said last mentioned service agreement impractical and made it obviously impossible to finance the enterprise; that on February 2, 1924, complainants so advised Arthur N. Powers; on July 26, 1934, Insull, through Tobey, informed complainants that the opportunity Insull was then giving Arthur M. Powers to carry out said enterprise was the only one Insull would give anybody, to which complainants replied that they were entitled to priority of opportunity over Arthur H. Powers, and they were insisting and would insist upon their rights in the premises; following the declaration of October 15, 1934, that Insull would not negotiate with complainants and that they would have to deal in the premises through or with Arthur N. Powers, complainants on October 16, 1924, came to an oral understanding with Arthur H. Powers temporarily to suspend all questions of the relative rights of complainants and arthur M. Powers to negotiate or close a deal with Insull and to proceed, through Arthur M. Powers, to endeavor to bring Insull to the point of going through with the proposed leasing plan worked bout by complainants, or some other fair and reasonable arrangement in the matter; that pursuant to said oral understanding complainants on the last mentioned date furnished Arthur N. Powers with further data and figures showing the impracticability of said draft of service agreement, and also figures and tabulations supporting the last mentioned leasing plan, and copies of complainants' proposed contracts with Wilsey & Company and J. O. Heyworth; that thereafter negotiations between Arthur H. Powers and Insull were continued without effecting anything material. Meanwhile and while the aforesaid negotiations were pending. complainants and defendent Arthur H. Powers, drafted under date of February 21, 1925, a memorandum of agreement, the parties to which were Arthur N. Powers of the first part and complainants of the second part, which proposed contract provided inter alia

est trapperge abirted headlener tool birs rebast of vitastes precions on a some it obtained impossible to figure the cutprime; that on introduce 2, is a, complificants or edvices arthur o. . ore; on daily dd, 10 i, hereall, hereagh ready, barcened complainable that the opportuity lives are then giving tribut I. . owers to carry out soid esternished in the only our lamit. rould give saybudy, to thoo completions of the they were entisied to priority of opportunity over arinur . The re. ord they were inniesting and would inside their rights or con the premises; following the decirration of Gotober 15, 1944, whit bine quet o ff bur serverer juco deix abilitojan fen biene lineat have to deal is the precises through or stre Tratus A. Tourse, complainmen on Colover 10, 1924, once to an uz-1 understanting in employed ... have to entity to entity if the reliance of the recentive rights of complainants and track to covere to d scans at source of ast light distract a source of sittinger Araban E. Posers, to redecate to bring least to the thing the yd fus. Prance mai; anie ak besogong ent Atte dywordt meion od sange, or sour other thir rail responses to remaining the metter; that imitiated to e il orni remieratement, not condity to e. T. Mitt e bodescoul of the Domesian feet of and an eiter tariner date and librates abortes the terrection billing to - algore law of the comparison of the confidence supposting the Lant weationed towaing part, and copies of oneplaimants! proposed contincts with tilesp ( duringy in a. a new a first analytic and the second of any training a sect of the second second . IT's a unidept constraint backers and the limit backers the three cours sent in the the Presencial entractions are setting and artificial complainments and defend at "thus s. . The . The complete the companies of of series and tourselved of the series of the first the control of defend areas are borders of the forth of the following the economic sail, which reposed quarters traction and le

for releases by complainants of their interests in the Illinois Light & Fower Co., and also provided that contemporaneously with the execution of the contract and contemplated releases Arthur N. Powers should make cash payment to complainants of \$5000, which it was understood between the parties would be furnished by Insull pursuant to promises or representations that Insull would furnish Arthur N. Powers with the necessary funds to procure such releases from complainants; that said draft of contract was signed by the parties thereto and the releases therein provided for were also signed by complainants; that neither were delivered because complainants were informed by Arthur N. Powers on February 22. 1925, that he applied to Tobey for \$5000 to pay complainants for the aforementioned releases and Tobey stated that no moneys would be furnished by Insuli to procure releases from complainants because Arthur N. Powers refused to accept or execute the aforesaid draft of service agreement; that from said last mentioned date to the latter part of July 1935, negotiations continued between Arthur N. Powers and Sanderson, who represented Insull; the latter was endeavoring to persuade Insull to necessary modifidation of the draft of service contract, or to consider a leasing plan; Sanderson at one time refused to modify and defended the terms of said service agreement, and at another time urged Arthur H. Powers to sell out for a nominal sum of \$25,000, and at all times objected to consider a leasing plan and opposing any active progress of negotiations "on one untenable ground and another"; that finally Millard R. Powers, the latter part of July, 1925, and defendant Arthur N. Powers met with Insull and at that meeting Insull stated that he would not object to a leasing plan and would go through with any plan that would make the enterprise a success, although it might cost Insull's companies more than steam generated energy, and told Millard R. and Arthur W. Powers to prepare such plans as

for releases react a total and the reference at the elements of the complete of Do., and slaw provided that contemporareously with the executive blunds ere a . s finit' gravelet led slands on some some to anks cook rayment to complained of 2001, it is to reof the ward lines is had been in the further by the transfer of A. Powers with the necessary fands to produce such releaces from completeness; thet said draft of continuet was along by the pale grow and the released clare released and the orested on the sample that the solution of the same to be solutioned to the same to desplainness were lefered by iribus a. Parers on February 22. Less that he applied to feel or of the war good of bellega of fadt aless the storement over the colors of the color benefit as the colors mould be furnished by lacell to proper or lesses from completeante decembe de tipos de la la forera la forera de la rocció de la responsa de la their sites were tout the transmission outstook to their birestoles wentleder dete to the letter with it bull long, necessions adationed between itining is finders and the trainer of the see Treatly are that the treatment of the treatment of the treatly as necessary modification of the drain of service contract, at to cor bautier a trait ero or neuroba a trait minera a tabiance modify and delemmed the terms of acts courses agreement, interes of the relief of ere of . There began sold " ellens to pair to 1 or salitation of margorian and it as the . Coo. by to mer plan and opporing any motive crayress of segothetime "on one waterol of breils, gland to be the form by the bound blocker the latter pert of July, Liki, one estender tries to stee metal dis blues to bred basers flower prices toda in her flower with the and engloss so a lessing plan and revel or through with any plan that would make the enterprise a coccess, lithough I might to. grando har were most made afor salungmon stillman tens Some of Same Fritz to I and

would be satisfactory and would safely finance such enterprise.

Complainants state that during 1935 they were informed that Insull was in Europe, Tobey was out of the city and Sanderson was otherwise occupied, and in the meantime Millard R. and Arthur N. Powers were proceeding with an effective leasing and the preparation of the "necessary incidental written agreements"; that on November 18, 1935, the two last mentioned Powers, at the request of Sanderson, met him at Chicago, and in reply to an inquiry by Sanderson for their proposition in the premises, delivered to Sanderson the draft of the leasing agreement providing for the operation of the proposed hydro electric power plant by the Public Service Company for a period of fifty years upon a monthly compensation basis to Illinois Light & Power Company, and that Insull should have one-half of the common capital stock of said last mentioned company provided he took up and cancelled the master's certificate of sale of the capital stock of the Illinois Light & Fower Company, and furnished a sum sufficient to discharge all other liens and claims against the hydro electric power enterprise: and Millard R. Powers informed Insull that said last mentioned contemplated agreement had been submitted to Blyth, Wither & Company, bankers, and that they had virtually contracted to purchase at 90% of their par value \$4,000,000 par value first mortgage five per cent bonds, to be issued by Illinois Light & Power Company, and \$1,500,000 par value 75 preferred stock of the same company, without any guaranty as to principal or interest by either Insull or any company, other than Illinois Light & Power Company; that said proposed agreement was along the same lines as the so-called electric service agreement "Exhibit G", between the Powers Company and the Public Service Company of July 1926, only a little more favorable to the Public

woold be satisfactory and would eafely finance such enterprise,

Participal eres yeds 2011 alfreb sons what atmentalopse on with ord to the one your of the at ore them! tods brills wairn of the tal har bequeen actuards, see no condensation R. and Arthur R. rowern were proceeding with an effective leading and the presention of the "necessary incidental rittern agreemented; that on hovemen ly, layb, the two last ...ntlened carers, it the request of fouleran, net has at its property reply to an alequity by innerence for these proportion in the ween a contact to that be decreased to the contact of the contact professor and the constant of the constant and the property of paser cuast by folion is trive on the end of the serior of fifty years upon a marghly courement ton bo to to the illinois alsolated Power Jon . ng, sad thit Install about 1 ive dustining of the company THE TO BE TO BE THE TARGET OF THE STRUCKS OF THE STRUCKS AND STRUCKS AND THE S ishing one is also to etablished etablished balleging bus qu stook of the Hillards Light & force Company, and furnished a are sufficient to the participation of the safety and called beane of arevo. . H brailing a gesta resea newer sincesis orbed ente Insult that send agus annipoped content. Led agreement had ocen but yedt från til i transfö guammed a trånli "Mrgli, of trillmöre virtually cools open to earch so at the 20 of their seatons in the or view first morrange fire car carr . The view of the Hillwole alght & comer Townsey, and his will are read T. preferred strok of the ever company, williout as gune ner ar a and the court of the end and an end of the contract of the con or fire org. Beautury his finds tyrm bus town? A signil signilit time over, white the currents bull some of the amount same of woods " dailing "", between the forest Company and the "notic of ice Company of July 1926, only weiltin more toworable to to weilt

Service Company as to price of electric energy to be produced at the hydro electric plant during the term of the 50 year lease; that said proposed contract gave to Insull during its term one-half of the common stock of the Power Company; thereupon Sanderson stated that he would check up the draft of proposed leasing agreement and take up the same with Insull and report back to Millard R. and Arthur N. Powers.

That on December 17, 1925, complainants learned from an alleged representative of Veva Powers that Sanderson had completed the purchase of the Master's certificate and the same had been delivered to Insull on December 16, 1925, but were unable to obtain any information other than above set forth touching the progress, if any, in the concluding of the proposed leasing agreement; on December 18, 1925, complainants notified Insull in writing that definite action must be taken by him by January 1, 1926; that on December 19, 1925; Insull through Tobey, advised Arthur N. Powers, as complainants are informed and believe, that Insull had directed Sanderson to be in Chicago January 4, 1926, and to remain until satisfactory contracts were executed by Insull, and that meanwhile Insull desired Arthur N. Powers to induce complainants to take no legal steps in the matter against Insull; that between January 4, 1926 and February 15, 1936, negotiations in the matter were carried on, as complainants are informed and believe, almost continuously between Arthur N. Powers and Sanderson, but no definite conclusion was reached; that on February 15, 1926, at the request of Insull, Tobey, Sanderson and Arthur N. Fowers met at Insull's office in Chicago, and Insull then and there, as complainants are informed and believe, declared that neither he nor his companies would enter into a contract providing for fixed payments lervice Company as to price of execttic oners, to be set unused the hydro electric plant during the total a the bO yet along the the hydro electric plant during the contract of the operation of the contract the set of the contract of the contract state of the contract of the co

That on who when if, is the domining and and AN MILEGE TESTRECHED BLYC OF VERY PORCES TEST LIGHTEN TO war a set the executions winders and to eardown add hetalquos had been dilitered to irent in intemper 16, 1885, but were unable to obvers any referencies active test to obtain towences the transfers, if they, is the transferred of the composed lauring agreement; on becamer it, as t, ass, it is notified min voi mode i se dependitor estanten i de quistre el liment ay Jamesy i, it's, that on homeber ld, 1986, theull through bestolia est directiones es terses. A Testa beside, Tetal and believe, that insulined Historia adereon to the city and James 4, 1986, and in the Hill entities or your rese translated by locally and the commercial formation of e of a langua of a state of lataret. We are led of orest in an analysis AN THE MERCH RELIEF I WILL TENT HOTELD A CHARLE TOTAL AND MAN Fobruary 18, 1926, negotistions to the section of the ma apagimicanthe ere intorsed but being , inches entitle ere between ribur 1. . . . ers tol Parterson, but in refinite the clusion and reached; that on beer mary 13, 1976, if the recent of Issuil, Tower, fandergon sud ettail . . . ers ant of July 113 office is thicago, and is that there are there, as come increas ate the redsian fact being, touchers and the best best brains signation would enter into a contract providing for fixed - Fartis for electric energy to be produced by the proposed hydro electric plant; that he, Insull, owned all of the capital stock of Illinois Light & Power Company and would control said proposed hydro electric plant as he chose; that Insull or the Public Service Company, as owners of the stock, would allow Arthur H. Powers to purchase and pay for out of its earnings 49% of the common stock over a period to be agreed upon, but that when Arthur H. Powers had paid for such 49% of said stock, it must be so controlled that he could not dispose of it to others; that he would be paid a sliary for three years of \$10,000 per annum plus other expenses in connection with the power company as should be agreed to from time to time by Insull's attorneys, Ishaa, Lincoln & Beals.

On March 1, 1936 complainants and Arthur N. Powers orally agreed together that legal proceedings against Insull could not and should not be longer delayed, and that there should beufiled a bill of complaint in chancery; that in view of the absence of Wilbur F. Powers from the state of Illinois, it would be convenient that such bill be filed by Millard R. Powers as sole complaint, and Wilbur . Powers be made a defendant; that Arthur K: Powers was a necessary and proper defendant thereto; that instead of putting Arthur M. Powers to the necessity of filing a cross bill in order to procure effective control of such suit when the same should be instituted, it should be agreed and was so agreed between the three Powers that Hillard R. Powers should not dismiss such proposed bill without either the consent of Arthur M. Powers or full opportunity to him to file his cross bill in such proposed suit, and that Arthur H. Powers would assist in the preparation of such proposed bill to pay the cost of printing said last mentioned bill; and "further inducing said last mentioned agreement that the interests of Arthur

for electric energy to be produced by the proceed by the crotted plant; that he, lammin, owned all of the crotted stack of limits hight differ fearury and would control said proposed by dre electric plant he be obesed to the fearly of the Public Service Company, as orders of the fact, would vilou arthur d. Fowers to purchase and pay for out of its cermings 60 of the common stack over a period so be agreed about that even arthur d. Fowers had paid for such 49% of said around the that he could had dispose of it to others; that he would be paid a sainty for three years of 10,000 for samus plus other appears in connection sith the cores company samus plus other appears in commetten sith the cores company has should be agreed to from time to the cores company has should be agreed to from time to the lastice of some company has should be agreed to from time to the lastice of the cores company labour, threat it do from time to the same of the form time to the fearly for these pears of the cores company labour, threat the same of the from time to the lastice of the fearly for the lastice of the fearly files the cores company these, threat of the fearly files the cores company them.

on March 1, 1986 complitments and other at lowers ilusat faninge ogniksaper. Lypel fodt radioger Essrys yllere sould not and should not be longer der yet, out thet shere should eds to wait it sadd ; greeneds at this most to like a belit ed. absence of tilour I. covers from the state of illingia, it rould be convenient that auch bill be filed by willerd ". Powers so sie complaint, and cilbur . . . evers be made a defractation anthology de some and a tecesary at a traces and another defending Shareto: that immtend or mating orthur K. . emers to the accountry to litte a cross bill in ther to provide filentive countries hard and the start the best and bloods are a made and and a start force and the served betrack the three Powers that cluited .. 'out o fra. der 160 % dile juodile 1110 beregona deve esteth jou blyade of Arthur M. Powers or full concrusity to his to file hos cross binew arewe' . Traite that the proposed court in against in the preparation of each proposed this to ver to of printing said last meationed bial and "further todacing red less aunticopid unrecourt the the interests in lether

N. Powers should be protected without the necessity of filing a cross bill; that he expressed the belief that the filing of such proposed bill of complaint might so challenge the attention of Insull to the illegality of his conduct as to bring Insull to execute a reasonable contract or contracts with or through Arthur N. Powers, with whom alone Insull proposed or offered to deal, and that if Arthur N. Powers, in order to protect his interests, was compelled to and did file a cross bill in eaid proposed suit, Arthur N. Powers would take upon himself the onus of the institution of such suit and Insull would utilize that fact as a pretended reason for refusing to negotiate in the premises with Arthur N. Powers.

That on March 17, 1926, complainant Millard R. Powers filed his bill in chancery in the Superior Court of Cook County against Insull, Illinois Light & Power Company, Public Service Co., Wilbur F. Fowers, and Edward M. Sanderson to redeem \$1,000,000 capital stock and \$2,500,000 of bonds of Illinois Light & Power Co. from Insull's claim of ownership, and for an accounting and other relief; that on March 18, 1936, Insull through Tobey asked complainants to name the cash sum which they would accept in compromise and dismiss the bill; that on March 18, 1926, complainants advised Insull that they would accept by way of compromise \$400,000, and dismiss the bill on condition that simultaneously Insull should settle with Arthur M. Powers; that Tobey replied for Insull that he would endeavor to make a settlement with Arthur N. Powers; that from May 30, 1936 to July 5, 1926, Arthur M. Powers and Insull, through Tobey, were, as complainants were informed and believe, engaged in negotiations which fesulted in part in the agreement of July 10, 1926, between Insull, Arthur M. Powers and Public Service Company, which agreement was marked "Exhibit O"; that during the last mentioned

it. Powers should be protested without the necessity of filing a cross bill; that be everyweed the united in the filing of such proposed bill of sumplaint wight so challenge the situation of insuil to the illegality of his connect as to bring insult to secure a reasonable contract or contracts a its or through arthur it. Forers, with whom alone insull proposed or offered to deal, and that if other 8. overs, in order to protect his intersets, was competed to and did file a cross bill in said proposed suit, arthur 8. Forers would take upon blanch the proposed suit, arthur 8. Forers would take upon blanch the that the institution of such suit and insult would usilize that that fact as a pretended reason for refusing to regatists in the presises with Arthur 8. Forers.

That on March 17, 1926, completent Millerd R. Fowers filed his bill in distrest in the Superior dourt of door County menicat Incull, illinois biggs of company, fublic hervice Co., Bilbur F. Fowers, and Whesed H. Secieron to redrem tanil elouisi to about to 000,000; . But deets intiges 000,000, It A lerer Go. Tron Instill a claim of canerable, and for an accounting and other relief; that on March 18, 1876, Insull through Tobey seased domplainants to mean the coet our which they yould accord . APRI . Al dorse on fed ; illd off asleed bas esternee wi acomplete and a contract that they would team by say of rear retained so 1137 odd entanth bar 2000,000; beingraped icure. . L mair. dila altra block linal giangalania than or toyoohie bines of that livent tol beligny vector tent a settlement with irthur H. sowers; that from May 13, 1885 is daly 5, 1936, trabur M. Forers and insuli, through Tobey, rerete otaplakanta wer informed and besiters, engaged to negotivetons which foundted in park in the agreement of July 10, 1920. Statege Insuil. Arthur E. Cowers and Public Service Company, which beneditary seal and unitary that the design see succession

period complainants had no direct contact with Insull, but from time to time Arthur N. Powers represented himself as reporting, and pretendedly did report fully to complainants all of his conversations with Tobey regarding matters in contreversy with Tobey, representative of Insull and Public Service Co., and Arthur N. Powers; and that to secure the confidence of complainants and to throw them off their guard, pretended to report to complainants in the presence of Aldrich. and pretendedly as a part of Arthur W. Powers' conferences, and only conferences during said last mentioned period, with Arthur M. Powers' own attorney, Charles M. Aldrich, and sought in the presence of complainants or one of them, the advice of Aldrich; that by time 5, 1936, and thereafter complainants believed that they were fully informed as to the terms of the provisions of Exhibit C, and of a so-called electric service agreement between Illinois Light & Fower Co. and the Public Service Co., being Exhibit E, while in truth there were substantial terms of Exhibit C, D and E which were not disclosed but were concealed by Arthur M. Powers from complainants; that on July 5, 1936, Arthur H. Pesers advised complainants in the presence of Aldrich that Tobey had agreed, for Insull, upon the terms of the three contracts, aforesaid, excepting as to the actual price to be paid by the Bublic Service Company for electric energy, and that the same did not include provision for payment of any part of \$400,000 to complainants; that Insull would not and so declared, pay that sum to complainants and would not deal with them except through arthur M. Powers, and that it was a condition that contracts would not be executed until Arthur E. Powers should procure releases by complainants to Insull and others, and also a stipulation by Willard R. Powers to dismiss his chancery suit without costs; that Arthur

this three data testanc fortio on bed etamaisland bolton from time to tiet Arshur M. Forers represented himself as reporting, and pretundedly did report fully to penolciments all of his conversations with Tobey regarding satters in covtroversy sith Tobey, representative of Insuli and Subine Service Co., and arthur S. lowers and that to senure the confidence of complaintage and to three them off their prort. presented to report to completence in the presence of ildrich. and protendedly se a part of triber to force and thebenders has only conferences during evid last mentioned ortho, with Arthur H. Posens own attorney, Charles H. Marton, and sought in the presence of completenate at one of them, the scholor of aldrich; that by direct, 1808, and the restor completency is believed that those fully informed to the that the village of the provisions of Eablid U. and of a so-exlict termination agreement between lilitatic sight & cover Co. and the smalle Service Co., bolks Arhibit E. while is trich there were noted secondal for erry doids a bas a ju sididar to smeet Laisante Sut were concealed by Arthur M. cowers from complete other od ni ard misicado besirbo errest. E rudrat A 2861 . B yint se presence of Aldrich thus Tobey has sareed, for issuil, upon the sor or the three contracts, alor unid, recepting or to the somet price to be prid by the ratio of reside Comp.ny for electic carries, and that the a se ful not include yourists illient sent tablemissions of FCC (Duri to dien gas to inserted tot would not and do declared, any that sum to respirate and to get of a tuder shapered become made date Leab ton bluom vetugate ad ton blow administration that the an a ser il test natil arthur S. Fewers whoself property selectes by compactuately to lastil to other as a cala bus sandto bas lived of Torth a judy jeteco dendile flan Transaca ald sammalb of France

M. Powers was by said contracts required to assume certain indebtedness to Insull, including Insull's lien on the capital stock of Illinois Light & Power Co. and the amount paid by him to purchase the certificate of sale from Yeva Powers, but exclusive of any payments to complainants, amounting to a half a million dollars; that Arthur N. Powers had no means of paying anything to complainants except prospective income from the common capital stock of Illinois Light and Power Company, and possibly salary as president; that Insull under the terms of said last mentioned contracts would have control of the majority of the Board of Directors of Illinois Light & Power Company during the period of construction of the proposed hydro electric plant, and Insull also insisted that the plant should be constructed by Sanderson & Porter, who operated only on a cost plus basis; that such plant would cost substantially all of the proceeds amounting to five and one half million dollars of bonds and preferred stock, as above mentioned: that the Illinois Light & Power Company was required to pay \$12,000 a year for interference with the Kankakee and Wilmington plants of the Public Service Company, and that \$90,000 was to be allowed the Public Service Company as compensation for and disbursements in operating said plant for a period of fifty years, and Arthur N. Powers had difficulty in inducing Insull to agree upon a price to be paid by the Public Service Company for electric energy, etc.; that the charges were so high that about all Arthur M. Powers would get out of the enterprise was the satisfaction of being identified with the completion of the proposed hydro electric plant and the possible ultimate realization of a sufficient amount to pay the one half million dollars above mentioned; that if complainants would execute and deliver the releases provided for in the contract of February 31, 1925, exchange mutual releases with Sanderson & Porter, and dismiss

A. comers see by eald contracts forvited to seems think indebtednose to lecult, including incomits and excapadehal stock of littanie Light & Fower Co. and the nament cald by age to purchase the certificate of sais from Vers to era, but exclusive of any payments to complaintate, approximg to a loss galyes to sacra or dear a forest is dealer ad line as ent mort escoul articognous arcons chantleiques of anistran common copital stock of illinate light and cover longery, and "coolidy estary as president; that incull under the terms of said last month open contracts would have control of the amjority of the Courd of Ofrectors of Litterns Light & loser longuage during the seriod of canatruction of the propose bytro electric siant, and lumnii aime insisted that the plant and it was in structed by Sandaruou e north r. and operated only on a cost to it will that adve too them take down that the bod end the precede emplayed to fire and one bill allice to love to bonds and priforred cteak, as chave contioned; that the Illinois Light & forer vanguey see required to pay (15,33) a year for ingeriarence pith the hankeles and dilaterton plants of the Public Jerrice Dompany, and that jaki, and to be ting-id the Public service longeny as congraction for an alchurante in operating said that the a period of fifty years, and disher E. Forers had difficulty in inducing lasmil to agree upon " oficeris ict vasios. Solvin othin, and yo blag of as saleg the story that the charges were so high that there were will - sitte and ear wait totte edf to the color same for the same Caetion of saint identified with the Commission of the manager to believieve a mille plotonom and has been courter orbys avode triller actility fiel one ads you of immore faciallies a nos teleficio da servicio no marco escente con la filita de como escente de la constanción de la const releases provided for in the contract of behrungy it, 1874, esteet to treat a no rever site there are treater

Millard R. Powers' bill against Insull and others, Insull would release Millard R. Powers and surrender to him all his notes then held by Insull, and Arthur M. Powers would pay \$150,000 to complainants (\$100,000 to Millard R. Powers and \$50,000 to Wilbur F. Powers), as provided in the unexecuted contract of February 1, 1925, and would pay the additional sum of \$2,000 to Millard R. Powers and \$10,000 of the amount so offered to be paid to Millard R. Fowers, Arthur N. Powers would pay soom after Insull should execute contracts in the presises, the balance with interest at the rate of 6% per annua from July 1, 1926 to be paid in monthly installments of \$500 until the hydro electric plant was completed, and would apply to the payment thereof all carnings Arthur M. Powers might realize over and above a small salary allowance; that Arthur N. Powers would also furnish Millard R. Powers free of rent reasonable office accommodations for the practice of the law, and give him the legal business arising from land purchases and other activities incidental to the erection of the hydro electric plant; that on account of the \$50,000 to be paid wilbur. Arthur would pay allbur as soon as Insull executed contracts \$5,000 with interest from February 21, 1925, at 6%, and the balance of the \$50,000 from surplus of income after operation of the proposed hydro electric plant commenced, and would possibly employ Wilbur F. Powers as engineer during the construction period and pay him a salary of \$1000 a month; that Arthur further stated that he knew his last proposition and offer would be a disappointment to complainants, but it was the best he could submit, and if such offer was not accepted by complainants all negotiations with Arthur N. Powers and with complainants would be declared off by Insull; that Insull was very much incensed with Millard R. Powers for starting his suit against him and

Willerd of Agrees bill crime fearly outers, an oralling sould release dillard at the secondar to his il bit. 199,000 to commission (199,00) to salist the constitution of the salist Elent test ent el barivelt es premi ... xedil es CCC. CGC some and article to the contract to be a granted to the contract to these with a regist too over with brailing of CCC, to officer to be self-in latered as terral of ble, to be breeked would say some efter insula signid erronse contracts in the greature, the balance with autoroph to the rest of he ve THE STATE OF THE STATE OF THE STATE OF SECTION OF THE STATE OF THE STA the formal property and a second property of the contract of t would an ing to the hayment thereas his areatings through it of there iedi jacaseolir yesika ilkee r svoor tee tavo saliksi ingle to term of the laterial telephological before areas as and the est in enlight service of the territory of the contract of the contract the contract the contract of the contr isw, ad jive him the L of busines to the first first purchases orby discribing the analysis and the sit of a transfer of the british by a electic bine of of 177. All soll in forces, we fell the La mirrore - ngaretjens i jennyen garesat bilang an madili yen bilang espider and the first the second of the contract of th with a state of the selected as a fact, but and to promise of the property is a figure to the control of the property and the toler in accourage to constitute the results of the courage of the confidence of and the present the states of the second trees the - er film - tollo comminication to the cid roas ad fait before els that we get his took for our rolls form it has aliested , and a principal is able often the observation of audited field beindredens also bearons, our year . . Limbel the citeral of the forelook so with siliard R. covers for at allow its care against his .

unless the same was promptly dismissed would employ able counsel and litigate with him, whom they knew was about 77 years of age. as long as he lived and that he would never get a dollar out of anybody; that it would be unwise for complainants to attempt to interview or negotiate with Insull or Tobey because of the declared attitude of Insull against him; that in the course of such conversation between Millard R. and Arthur N. Powers of July 5, 1926, Millard asked for copies of the said last proposed contract in order to formulate a report in the premises in detail, but Arthur stated that he had no copies; that he had left his copies with a bond house with which he was negotiating; that Arthur never furnished complainants for their inspection any such copies, but on July 6, 1936, at a further interview between Millard and Arthur, Arthur repeated the representations in regard to payment, and then again it was suggested that Millard R. Powers be allowed to see Insull or Tobey in an endeavor to induce Insull to make a cash payment, etc., and that Arthur replied that any such interview would be fruitless and probably endanger all that he had accomplished; that Arthur N. Powers fraudulently concealed the true state of facts and either deceived said Charles H. Aldrich as well as Millard R. Powers. or secretly and unknown to complainants did confer in the premises with Aldrich as Arthur N. Powers' attorney; that Insull and Arthur M. Powers on June 30, 1926, agreed upon all the terms of the contracts, Exhibits C. D. and E, including the price to be paid by Public Service Company for electric energy, and that contract, Exhibit C, did include provisions for payment of complainants at least in part; as they are informed and believe and charge the fact to be, said contract provided for a loan by Insull to Arthur N. Powers of \$125,000, the disposition of only \$17,000 of which was fixed by said contract, and the balance of

leganor and velous twos breaks it vituate any sens of sector and lineage of the next was wast gode and die oragisal bas as long as be lived and but he sould rever get to deap and an of unybody; that it would be unvise for complete, ats to at antito interview or ungothers with limit or Jobey a course of the decision with build of lastif against him; his as as the course of to ore and a later of the season of the areas of the consequence of the area of the consequence of the conse beer as test birs so to series for settle still set bear as contract in order to forgulate a recort in sha premines in defill, but itshur stated that as had no contest that be he he help to be and indicator on ore of doids of a south back a dile colpod Arthur never furnished completents for their turnents and the and somes, but on buy t, iste, at turner interest bettern willist and attems, are san resure a newton and the bas brailty regard to payment, and then epote it was augmented to eliterate A. Possas be allowed to see thould be tobey in an entergy to induce (soull to make a cash papers, etc., set that rebuy viction the remittent of two works in the remitted to endenger ell that le bud 'coordished; that alle regarders fraudalentif comessied to true state of facts and vitusiahusti deceived and Charles M. .. defich as reliable the bevisced or sammelly and unknown to compart to the confer in t and refinir a. Course on June 2014 1978, and the course of these of the contracts, Draidite C. t. and C. tacl die, in them to be puts by subite ervice lengthy for electric energy, an To there's to an older acains bis , sidiat is setting that evolved bar recroins ers your as its, and success as assentinger and charge the first to be, said contract archied for a confic Issuli to rolling the of the direction of call 117,300 of which was fired by wall contract, was the telegrap of

\$108,000 was intended, as agreed between Insull and Arthur N. Powers, to be used by Arthur N. Powers to pay to that extent the claims and demands of complainants; that none of said contracts, Exhibits C. D. and E. provided that they would not be executed by the parties thereto until or unless Arthur N. Powers should procure from complainants releases of Arthur M. Powers in the amounts theretofore mentioned; that Arthur N. Powers at all times knew that two and one half mills per kilowatt hour and a total payment of \$30,000 per month was sufficient to produce from the probable output of said hydro electric plant, an average output of minety million kilowatt hours, upwards of \$585,000, and would not to Illinois light & Power fompany over and above carrying charges, an income available for the payment of dividends on the common stock of upwards of \$200,000 per annum; and it is averred that Insull had not declared that unless the offers of settlement by Arthur N. Powers to complainants were accepted, all negotiations with complainants would be declared off: but that at most had only declared that all such negotiations would be declared off by Insull unless complainants accepted what in said Insull's judgment was a reasonable cash settlement of \$250,000; that on July 10, 1926, at Chicago, complainants relying upon the false representations of Arthur M. Powers and induced by the prior acts and doings of Insull and in ignorance of the true situation, did orally accept and orally communicate to Arthur W. Powers complainants' acceptance and orally authorized Arthur W. Powers to deliver the releases by Willard R. and Wilbur ". Powers releasing Arthur N. Powers & Co., Arthur N. Powers, Insull, Public Service Co., and Illinois Light & Power Company, and that they would execute written releases between complainants and Sanderson & Portsr, and Millard R. Powers did execute a stipu-

. outle ist would be even cooning or holostel an 600,8012 carers, to be used up taker .. Journ to y an his extur the cities and seem the area in a seem in the contract of re: lan yerd at a dablicer, a tre it . Situalist interestable be executed ty the presence tested will will a critically andit in use mir classisinger with ormer, under green endor of the three times and therefore the times of the an extent of The state of the s The street was the state of the street of his area attention walfilles to promon from the restance current of amelalities agangalag galagag aning merengan datan Do danah mengang manag menagan menagan penganagan dan berangan pengangan inal monthly of ser house her than the transmit assess a lover partent that the course of a course of the second and the transfer to deeps unsace the mensions of the season as tel aldoniers The exit of a both we say of her persons may 0.0,000. To sharmage go dannelson. To beetite eds assine finit terrioob son bed artists . Temper to conjurity and the control will be patient as fire some to a set the itse par mon as proper annual date the training and the ball which the cold track which is the first the - Hanse big at for bet coor sessui i too seelar lineal yo I to 1 CO. Co. To seem life: Resp ald nowest a are inempled and make the same as many many that a factor to the an talke cepteres to the extension of extension of the expension of the state of the son accept to the almost to satisfy the state rains situation, did pralip rade. I see it seem ellero tib andtoutie one chelo ki s i di bodistoroli, fajordisegado ettaco, "A ে এবেন্ট্রা বা ে ে ১৯৯ বুল ৪৯১১১১৯৮৯ পূর্বে মঞ্চন্ত্র প্রায়া করি স্কাল্পন্তর প্রায়া করি কর্মকর্মত ১ 📆 Person and the contract of the reds in the teath of the state of the contract of the state of the sta , . sir tis, and all red canadate patitie attorne block your 

lation with all parties defendant therein to dismiss his said chancery suit without costs; that on July 10, 1926, Arthur H. Powers delivered the releases to the parties therein named and the stipulation to dismiss the Millard R. Powers suit; that such proceedings were had in the Willard R. Powers suit that the same, as agreed in the stipulation, was then and there dismissed without costs; that on the last mentioned date Insull, Arthur M. Powers and Public Service Co. executed the contract, Exhibit C. As complainants have learned since the institution of the Millard R. Powers' suit, thirty days prior theretog Insull and Arthur N. Powers entered into a fourth written contract, relating in ways unknown to complainants, but as they are informed and believe and charge, which materially affect complainants' rights in the premises, the existence of which was fraudulently concealed by Arthur N. Powers in co-operation with Insull, the discovery of which complainants seek and demand.

That complainants' acceptance of Arthur H. Powers' offer and delivery by them on July 10, 1936, of the releases above recited, was a direct and natural outcome of the conspiracy of January 21, 1921, and the acts and doings of Insull pursuant thereto.

It is charged that the execution of the contract, Exhibit C, by Insull and others, and of said contract, Exhibit E, were as between Insull and complainants in law and effect executions for and in behalf and for the use of complainants and in fulfillment and performance by complainants of the contract of December 21, 1920, between them and Arthur N. Powers, and that complainants' releases, Exhibits F, and G, so far as affecting Illinois Light & Power Co., Insull and Public Service Co., were in effect and should be construed in equity, as but the consent

the old estment of mierods tembested seitres lie dity moital chancery suft sithout couts; th t on July 10, 1988, within 1. Powers delivered the releases to the parties therein used and the eticulation to fieales the "illers . Forers suff; that such proceedings were had in the Willard 5. Fowers suit that the seas, as agreed in the atipairilation, was then an chartened in seas ab it: . Husan of a benefines test off no fair ;ateo fuedtir A. owers and Public Service Co. erecuted the contract, making C. As complainants have learned since the inetitution of the miliard h. Powers' suit, thirty days prior thorstop laculi an dribur A. Povers entered take a fourth entities control, within in service in the rest of the service of the servic believe und oburge, which we terisily affect tourishes at the is the presides, the existence of thick was freudoscally oneest livent driv nestraequ-oo at creeci . A rudita ve beine discovery of which complete use keek the deaned.

That complained a special complained a status a server of the relaced of the relaced above registed, and a liver and artural automa of it conspiracy of lanuary Al, 1871, and the not, set foreign of lanuar arms at thereto.

It is obarged that the execution of the contract, axitation is inhibit 0, by insult end ordered, and of arid anticed, axitation, exhibit is used as between inputs and and for the cast of constitutions and in hebelf and for the cast of constitutions and performance by complete and of the contract of th

of complainants to the terms and provisions of the contracts, Exhibits C, B and E, and as to Arthur N. Powers the releases should be construed in equity (and otherwise should be canceled) as powers of attorney to Arthur N. Powers to negotiate and execute the contracts, Exhibits C. D and E, for the use and benefit of complainants, and that Insull, Arthur N. Fowers and Public Service Company are estopped so to deny.

On July 10, 1926, Arthur N. Powers delivered to complainants a release to them by Sanderson & Porter, and a joint note of Millard R. and Arthur B. Powers for \$137,000, theretofore held by Insull, and a note of Millard R. Powers for \$5000, likewise held by Insull, and paid Millard N. Powers \$10,000 and Wilbur F. Powers \$5400; that commencing August 1, 1926, and ending January 1, 1927, on the first day of each month, Arthur paid Millard R. Powers \$500 per month; in addition thereto Arthur N. Powers, between July 1, 1936 and February 11, 1927 paid to wilbur F. Powers the total sum of \$1725, on account of services as engineer performed by him pursuant to the offer of Arthur and the acceptancethereof by complainants; that between July 10, 1926 and March 3, 1927, Arthur paid Millard R. Powers a total of \$1809 for professional services rendered by him as attorney, pursuant to the former offer and acceptance thereof. These are the only amounts Arthur N. Powers paid complainants pursuant to said offer and acceptance. On March 5, 1937, Arthur M. Powers refused to make any further payments to complainants unless they and each of them would agree to cancel and release all obligations and liability of Arthur M. Fowers to complainants. and leave to Arthur M. Powers all question of further payments by him to complainants, and complainants refused so to agree.

of complainants to the terms and provisions of the contributafinitite J. B and i. and as to prime h. Lowers the releases should be construed in aquity (and othersise about he conscied) as powers of attorney to primar h. Lowers to negotiate and the coute the contracts. Exhibits C. B and H. for the see and benefit of complainants, and that largely driver h. Lowers in tables Service Company are estapped so to very.

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On March 15, 1927, Arthur in writing represented to complainants in substance that the unexecuted contract of February 31, 1925, had been executed and was then and there in force: that coaplainants had failed to carry out said contract; that a further opportunity would be provided complainants by Arthur to fully perform the pretended contract, and that in default all rights and interests of complainants would cease; that on March 15. 1927, complainants began to suspect that the false representations made by Arthur were possibly not true; that thereafter on May 5, 1927, complainants first procured copies of the contracts, Exhibits C, D and E, and first learned that the representations of Arthur as to their terms and provisions were false, and first learned the provisions of Exhibit C for the advance of \$125,000 to arthur and of the payment thereof to him on June 30, 1926. as recited in Exhibit C; that on May 9, 1937 Andrew Stevenson. Elliot C. Williams, Lee D. Mathiss and Charles H. Aldrich filed a voluntary petition in bankruptcy against Arthur N. Powers in the District Court of the United States for the Northern District of Illinois in the eastern division thereof, which was then pending.

On information from the Secretary of the State of Illinois, the officers and directors of the Illinois Light & Power Co. are Ben H. Matthews, President, Charles H. Seeberger, Secretary, and George H. Jones, Treasurer; and the directors are Ben H. Matthews, Charles D. Albright, Edward N. Bullard, Helen E. Moore, John E. Etzkorn, Charles H. Seeberger, and Arthur N. Powers, and with possibly she exception are such officers in pursuance of the provisions of contract, Exhibit C; that Seeberger is the nominee of Arthur M. Powers and dominated by him; Ben H. Matthews and George H. Jones are nominees of and dominated by Insull. By whom Helen E. Moore and John E. Etzkorn

On March 15, 1937, arthur is writing represented to complainants in substance that the uncascuted contract of February 71, 1825, had been executed and one then and there in force: th c coapicturate had falted to carry out said control; that a further opportunity sould be provided complements by Friedly porform the pretended contract, und that in default all rights and interests of completeness sould cease; thet in darch in. 1927, compising to began to suspect that the false representations mode by Arthur were possibly not true; that theoreter on car 5, 1927; complements first procured copies of the contract. Exhibits G. D and t. and first learned that the representations death has the start the endresses her except and of or andra to learned the provinces of Tablelt ; for the charte of 9100.000 to arthur and of the payment tasteof to him on June 23, 1936. as resided in arhibit 0; that on way 8, 1999 tottes it terouson. Maliar C. Williams, Let u. maining ond Unaries E. Watton Diled a voluntary petition in bankruptoy against Arthur B. Poters in the Matrict Court of the United States for the Morthern District of littests in the occient division thursel, shook and then . No Liberry

were elected directors complainants know not, but charge on information and belief that one of them is dominated by Insull and the other by Arthur H. Powers: that Insull dominates and controls all the activities of Illinois Light & Power Company under or pursuant to contracts, Exhibits C, D and E, and Arthur N. Powers has become a mere figure head in its affairs. without authority or power except as directed by Insull. Complainants are informed and believe and charge that Insull still plans, pursuant to the conspiracy of June 15, 1911, unlawfully to deprive Arthur E. Powers and complainants (the real parties in interest) of legitimate profit and benefits otherwise accruable under contracts, Exhibits C. D and E. nominally to Arthur N. Powers, but rightfully and equitably to complainants; that pursuant to the last mentioned conspiracy. complainants are informed and believe, and therefore charge, Insull has prevented Illinois Light & Power Co. and Public Service Co. from formally executing contract, Exhibit E, which ommission has prevented Illinois Light & Power Co. to acquire any funds of its own and thus left it dependent upon Insull for funds with which to prosecute said enterprise and build the hydro electric plant, and thereby Insull has personally been put in a position to further dictate all its activities! that he has distated the personnel of all employees of said Illinois Light & Power Co., including the purchase of lands required for said enterprise through whom, in turn the prices of all lands purchased are, in the nature of things, largely determined and upon whom, said Illinois Light & Power Co. is largely dependent for knowledge of prices actually paid for lands purchased in the presecution of said enterprise, and in like manner and by the same means Insull has been enabled to and has directed that lands so purchased for said enterprise should be purchased and

were elected alrectors out himse mass not, but his far on information and belief to t one of them is deminated by Januar and the other by Arthur A. Powers; that Innais dominates and yes now years a text atential to settiated and its alexando ander or versulat to contracts, I hierto a, B et a, each Arthur A. Comers has become a mare figure bread in and . Fining. sithest subscrib; or power except se directed by latelia. Lineal fact sprado has evelled ore borrotal ers atsocialqued -cu . Hist . At angle to ventioned of the ist, isti, unlastilly to deprive Arthur a. sours ad early mante (the a libert bee after as maintain to the estimate out colling look otherwise accumulis ander contracts, chilles , sad . , accidently to arthur a. Forere, but rightfully and enutrolly to seaplifuncia; thit pursuant to the list densioned consider of complainants are informed and believe, and there ore charge, lace treversed Lat wis sight a case up. and a mise Service Co. from formally excouning contract, Arhibit E, thick ourisation has prevented ittings, a roper 50, to tagging any funds of the ewe and, tout tell at descendent con langua to funds with which to prosecute and enterprise the built the bydro electric plant, and tueredy ideal his personnely by a post institution of the state's redrive of notineng a mi tag eionical been to use toly - in to lannucrey sit basetoib and ad It is seen to the contract the meant of the indicate of the target a start in and enterprise through whom, in turn the rries of the bank purchased are, in the enture of vilings, arthair determines an upon whom, andd lithmont light & over we, in it is not down or ac' as hear fore, she a not him glisufer cooling to appelyone not prosecution of erid enterprise, and in the manner and by the . Il hate tin and the or headens during and lineal again been ter apadermy o clouds entry the ther tol headouse or shart

the titles thereto taken in the names of individuals nominated, selected and dominated by Insull; that George R. Jones, the treasurer, is not only the nomines of Insull but an employee of Insull and Treasurer of the Public Service Co., and complainants charge that the only records that have been or are being kept of monies advanced by Insull or for the disbursement of funds of Illinois Light & Power Co. are the records which have been kept or are being kept by or under the supervision of George R. Jones, dominated by Insull; that no systematio, adequate or effective supervision or control of the affairs of said power company in ite own interest or in the interest of the holders of its common stock is now being exercised or is now possible under existing conditions, except as it is had from or through Insull or those appointed and selected by him; that by reason thereof Insull is in a position at any time, at his own whim, to out off indefinitely all financial resources of said Illinois Light & Power Co., however critical to its interest such financial resources might then be to it, and complainants charge on information and belief that unless prevented by order of court Insull will, in manners unknown to or possible to be anticipated by complainants, take advantage of the situation as hereinabove set forth, to carry out and fully effect said conspiracy of June 15, 1911, to formally terminate and take over to himself all interest of complainants in the premises as the real parties in interest: that by the terms of the contracts, Exhibits C, D and E, there is an obligation, nominally upon Arthur N. Powers, to Insull, for Insull's or Public Service Co.'s use and benefit, totalling \$375,000, which includes \$125,000 advanced by Insull to Arthur M. Powers on June 30, 1926; that except for payments of a total of \$17,000 to Aldrich and L. D. Mathias, as provided in said contract, Exhibit C, and excepting also possible payments by

the titles thereto taken in the mades a individuals compacted, selected and dominated of insull; that weares .. Jones, tresport, is not only the appines of insult set on tup.cyce of lagult and freesurer of the public Service ... ... occapielnesse Total total are to rese awas arest entropy year and Indi agreed alway to lease the death of for the distance to be made to of illinois Light & Poser Co. are the records which have been keps ur ase bring kept by as under the supervision of centee i. domen, dominated by Iceull; that no applicable, adequate or elfective supervision or control of the affiles to act to the company in its own interpret or in the interest of the bolders sidiancy ron at to factorer guied non at house nomeo atl to deports to est use at the trease tourishes fallett taken seeses to to it into the totales bus boshburge osods to Least thereof Inoull to in a position of the sent thereof to successful the to according the product of the product of the same of the transmission Light & Fower was, topeaver unisient to its anterest and fining dial resources sight them he term of the confliction to decree we information and relief the a unasse revented by order of pager Paraginisas oc of eleisac to or ascenu aramas al illi limen! by completivents, but not note but the special and attended to and apply in the contract of the confine color of the confine of diet to formally terminate the terminate and the terminate glimated of the of complaint to the product of the rest continue the true; tel teld ; ten y , selecter, recent and to series the by teld teld en collection, nominally upon ribbs a. . . wer . so in collection as incult's or fullist . Arrive Co. 's and - - benefit, the Library suffice of livert of become or 100,301 sebuloni doids 1016,575; intel . The Adda or the court of the court of the court of the court of of Car, Do started was 1. ). Startes of CO. T.2 of contract, Emblort 7, and excepting also , covider tagints by

Arthur M. Powers to complainants, Arthur M. Powers, as complainants are informed and believe and charge the fact to be, has appropriated said \$125,000 to his own use and spent or dissipated the same for his own and his immediate family's living and entertainment, but nevertheless complainants offer to do full equity in the premises and are willing, and do hereby offer to assume all obligations under said last mentioned contract for the payment of \$375,000 including \$125,000 advanced to Arthur M. Fowers. and to accept and perform the terms and conditions of contracts. Exhibits C, D and E, (assuming the substitution therein of complainants for Arthur N. Powers), and in all respects to carry out (on the same assumption) each and all of the conditions. provisions and obligations incumbent thereunder upon Arthur N. Powers, and upon substitution in said last mentioned contracts of complainants for Arthur N. Powers, to release and discharge Arthur S. Powers from all payments and obligations to complainants of any character or description.

Faragraph 23 of contract, Exhibit C, provides that said last mentioned contract was made by Insull for convenience and while he is bound by it, it is understood that he is in reality acting for the Public Service Co. and Commonwealth Edison Co., and that these companies are ultimately to receive any benefit to be derived by Insull under the last mentioned contract; that except as otherwise indicated in the bill, complainants are ignorant of just what interest, present or intended, Commonwealth Edison Company has in the premises, and whatever such interest may be, the same is subject to the rights and interests of complainants.

The amended bill prays that defendants may be compelled to answer etc.; that the execution of contract, Exhibit C, by

etasal içadi de prese. . L'aditi primati; campo et stemp de tental were informed and believe and charge at 1.00 to to to the apoinand the first of the work of the graduate of [10,481] his begind esant for his osu sed his is that a fall of the osu so all iot amas tainment, but severtheres compainment wifer to it it a naty in the premises and wir willing, out do nereby offer to become in age, est tol tostines, besoifned itself blos tehan applicable ils or 1376,000 including the . No sevences to Arthur ... armin, to asi to secapt and perform the term and conditions of contracts. Enhibits O. O and is freewated the acceptation there is complainmes for other M. cosets), and is it remain to carry out ( on the same assumption) sach and all of the distillant, . . Tugit. Bogu telebeteff dasgminal egoisegiago Da . Anoistete passis, and upon succeptantion is said last meratoned contract of completements for Arthur 4, Joseff, to release to dislater, e Arrium 5. Forge Them all payants at well iting to complituarte of any character or description.

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the seconded bill roys to drend ats any an conjection of content, truits .. by

Insull and Public Service Co. be found and decreed to be, as between Insull and complainants, performance by Insull of his contract and agreement of August 9, 1911; that the execution of contract, Exhibit C, by Arthur M. Powers be found and decreed to be, as between complainants on the one hand and Arthur H. Powers, Insull, Public Service Co. and Commonwealth Edison Co. on the other hand, on behalf and for the use of complainants and in fulfillment and performance by them of the contract of December 21, 1930, between complainants and Arthur N. Powers: that complainants' releases, Exhibits F and G, so far as affecting the Illinois Light & Fower Co., Insull and Public Service Co., or the cancellation of then outstanding bonds of Illinois Light & Power Co. be found decreed to be the consents of complainants to the terms and provisions of said contracts Exhibits 0, D and E, other than the terms and provisions of the same, if any, purporting or operating to deprive complainants of their interests in the premises in favor of and for the benefit of Arthur N. Powers, and that complainants' releases, Exhibits F and G, insofar as in terms releases by complainants of or to Arthur N. Powers, be found and decreed (on such terms as to the court may seem meet, complainants offering, as aforesaid, to do full equity in the presises, not only to Arthur N. Powers, but to each and all of the defendants) to be powers of attorney to Arthur N. Powers to negotiate and execute said contracts, Exhibits C, D and E, etc., and for other and different relief, as equity may require.

The exhibits referred to in the several bills are set out in hace verbs in the abstract and cover thirty-three pages thereof. It would unduly and unnecessarily extend this statement to again recite their several contents and moreover we deem so to do unnecessary for the reason that all the material

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parts thereof and all that is claimed in virtue of them are set forth in the averments of complainants pleadings, which are included in this statement. However, in arriving at our opinion we have read all of the exhibits and verified them with the averments and claims made in the pleadings as to their purport and legal effect.

parts thereof and all that is civized in virtue of these are set forth in the averages of complications; which are included in the statement. Forever, in arriving at our opinion we have read all of the exhibits and vertified them with the averages and olding and the presdings as to their purport and legal effect.

MR. JUSTICE HOLDOM delivered the opinion of the

Counsel for defendants contend that if the bill fails as against Arthur M. Powers and Samuel Insull, every other defendant is relieved of any liability to complainants. In the inception of this opinion we will state that we concur in this contention, and shall confine the reasons of our opinion to a setting forth of the relations between these two defendants and complainants without reference to the actions and doings or interests of any of the other defendants, as in our ultimate conclusion we shall hold that the bills state no case against Arthur M. Powers and Samuel Insull which entitle complainants to any relief as against them, either jointly or severally in a court of equity, and that the bills were obnoxious to the demurrers interposed to them and sustained by the chancellor.

The sequence of events to be extracted from the foregoing statement is about as follows:

Arthur and Wilbur, entered the field of public utility in the enterprise of constructing on the Kankakee River a hydro electric power plant. This required large expenditures of money which at times not being forthcoming, proved an obstruction to success. They needed five million dollars to stabilize the enterprise. After 1913 they met with financial embarrassment. Lack of the necessary money and experience were obstacles jeopardizing success. Insull was a competitor. An alliance was sought by Millard with Insull, who told him orally that if he, Millard,

eds to some of the salivered the of the sourt.

Compact for defendants of the this family overy other fails or against Arther S. . overs . A Sequel leavily overy other defendant is relieved of any limiting to compliments. In the largestion of this opinion we will savie that we concur in this montention, and shall confine the reasons of our equation to a setting farth of the seintions between these two beford als and complainants without reference to the solions and follows and conglainants of any of the other detendants, as in our viting to arthur is. Powers and some like the bills state no case against to any relief as against these should of severally in a court of squity, and that the other locations to the characters by the channellor.

The sequence of events to be extracted from the forenoing eletement is about in follows:

sillard . Forers, the lawyer, with his two some exthur and "limur, entered the fishes of molice estimates in the enterprise of constructing on the lankakee liver a cyler sire sirving power plant. This required large expenditures of acts with at times act being farthocaing, roved in obstruction to a cerus. They needed five million dollers to eisbilize the cett raise. After 1913 they sot with financial experience were one of en four times to experience were one of en four times at the necessary money and experience were one of en four times and experience were one of en four times when a competitor. An alliance was somethery entitled with insult, who told him entity that if he, will ref.

would construct a power plant on the Eankakee River, that he. Insull, would purchase the output at a price less than Insull's cost of production, which was not hydro. This he, Powers, chdeavored unsuccessfully to do. In this attempt he borrowed of Insull between the years 1913 and 1916 \$137,000, payment of which was evidenced by Millard's notes. He failed, however, to pay either principal or interest. These notes were secured by stock of the Illinois Light & Power Company. Later Veva Powers acquired a second lien on the stock pledged to Insull. She filed a bill to redeem, to which bill complainants were parties. A decree was obtained by her in that suit establishing her lien to the extent of \$30,000, and directing a sale of the shares. Millard promised Arthur to discharge Veva's and Insull's liens. This he failed to do, whereupon the shares were offered for sale by a Master, and Veva bought them. Millard R. Powers was at that time indebted to Insull in the sum of \$196,000. This he likewise failed to pay. Arthur was jointly liable with his father to pay the debt to Insull. In 1936 Arthur had negotiations with Insull with a view to paying this debt. Thereupon Millard filed a bill to redeem. He made no tender of payment of the debt admitted to be due. At this junction arthur sought to make a contract with Insull for an interest in the stock. This Insull would not do until Millard's bill was out of the way. Millard refused Arthur's importunities to dismiss his bill to redeem, or to give a release to Insull unless Arthur promised to pay him \$150,000. Arthur thereupon paid Millard \$20,000, which he obtained from Insull. Arthur's payments to Millard continued until Arthur's creditors had him adjudicated a bankrupt. The filing of the bill in this case was the final act of Millard. The filing, however, was subsequent to the giving of the releases by Millard and Arthur, set forth in the preceeding statement of the case.

rould construct a poner piers on the eracise ther, the bar . Liveni n. A rest coir: s to tuginu the acaderec bluce . Liveni cost of production, which was not hydro. This te, somera, endervoted unaunonostully to do. In this obtains he torrange to serve on ,000, VELT BIEL band 1815 ersey add mosested Lional to which were evidenced by Millard's notes, de failed, hencen, to pay salther principal or internet. These meter seve armired by stock of the Illinois light & sees Townsny. Later Toys Porsts sequired a second ties on the atoos placed to tenuit. Its filed a bell we redeem, to which will nompinized acre murrices. A decree was potabled by test in the suit stips and potable was correct the extent of 120,000, and directing a cale of the shares. sault of author for elegate tert of author and insula a treat. This be failed to do: whereupen ter shered rere offered for sale by a Master, and fore bought them, billard a. postro was at that time indebted to conull in the err of cide, 70. File he likestee failed to may. There ere jointly likely with his et to pay if and once and it crosses had tweets filed if illustry of teat ods The color of the color of the color. The production of the color of the color to regained. We make no timber of christne of it is it is in the to be acc. At whis jacotics arthur sought to wake " cortror to blum live at the second of the world that I would take de catil Hilland's Mil was out at he was. ... ord refused Arimar's importanties to dissibly his odic to retarn or to wid a s. C. contact limites the fau illusti in resident a sety \$150,000. Arthur thereupon said Fillerd "20,112, which T. C. L. t.ed from Insuil. Arthur o proposes to Miliary ornerists out in 1817.70 oredisons but his edgulated a leading. in this case was the final set of beliance. The thing, breezes, row- on bracile ye connect not be painty and of thempeodes and set forth in the preceding stricters of the oner. It is an elementary legal principal that a demurrer admits only facts which are well pleaded, and those that are not so pleaded are not admitted. Neither does a demurrer admit legal conclusions asserted, but not sustained by facts alleged, nor assertions of ultimate facts which are not reinforced in the same sanner. Also a demurrer does not admit charges of fraud which are general and not specific and charges of fraud alleged on information and belief are likewise not admitted by a demurrer. What is admitted, however, is confined to the state of mind of the alleging parties' belief and that only.

From complainants' pleading it first appears that on January 2, 1905 Millard R. Powers and Arthur N. Powers, under the firm name of Arthur N. Powers & Co., entered upon an enterprise to build and operate hydro electric power plants in Kankakee and will Counties, Illinois, on the Kankakee River, and that thereafter in September, 1908 they were joined in such enterprise by Wilbur F. Powers, who was a civil engineer; that complainants between 1905 and 1909 at great expense acquired equipment, maps, plats, profiles and engineering data, including in 1909 a complete topographical survey of a portion of said Kankakee River, also written options of puschase for valuable considerations paid and to be paid upon certain lands on the Kankakee River, and upon a water plant, a gas plant and an electric light plant, said water plant, gas plant and electric light plant entailing, had the options been exercised, an expense of \$600,000. As fraud is charged against the defendant Samuel Insull, in an effort by him to acquire interests in and supplant Millard R. and Arthur H. Powers in their enterprises on the Kankakee River, it may be noted that for the first time Insull's attention was called between January 2, 1906, and January 2, 1909, by Millard R.

service only facts which are well pleaded, and those that are not addite only facts which are well pleaded, and those that are not not good are not addited. Settler that are not seed a desirant that it is not such and the constant are not alleged, not seer that of ultimets from a solution are not solutioned in the season. Also a descript about are sent charges of from thick are general and not avoid and observes of the delication and belief are likestee not related by a descript of the chartest to the state of the are takend by a descript of the chartest to the state of the state of

From completement; Leading it wire copposes that on Jamesy E. 1905 Miliard R. Fowers and explain M. Foner, under the firm name of arthur M. Lowers & Co., entered mon an onterester to build and operate hydro electric perces plants in Kankakee and "lik Countles, L. Linots, on the kankakes wiver, and the travester in September, 1970 they seem joined in days enterested by wilbur F. Parasta, who was a givill received the constant was received between and 1909 as great duppense acquired equipment, meas, pieze, profiles and engineering date, including in 12.77 a po. alote topographical survey of " partiam of said Kumimk a liver, line written epilane of cumphes for valuable considerations .... in the net to be eated unen oprining lands on the linkerse direct well wither electing a greek the train one that them hive dood, this advisor of han thair elective light plant entalling, bed the costine been are proper errorses of (203,000). As freed is obtained the defendent feauel Landl, in an offert by sim to accord agreet as they were the action of brailed at asset bear at assets at a constant in their enterpeless in the denicies of two is now in bolists are militable a lineally a richard and that or trelilly to "Goo" of Arenal and "The Tanana" and the Powers and Arthur W. Powers to their Kankakee River enterprises; and that they advised Insull of their field of operation, and that Insull stated that he was not and would not be interested in any hydro electric plants or interurban railroads outside of Chicago. It therefore clearly appears that complainants sought Insull, and not Insull the complainants, in their Kankakee River venture. It was a case where the Powers were endeavoring to interest Insull in their Kankakee River scheme, not a case where Insull was endeavoring to intermeddle with their affairs.

From the preceding statement of the case, appears, what is contended to be, the initial contract in the Kankakse River project, colloquially referred to as the contract of 1911, From what is set out regarding the same there cannot be extracted the elements of a binding contract in which the minds of the parties met upon any definite project. It is contended that the contract was oral. 'f it was, it is obnoxious to the Statute of Frauds, as it was not to be performed within the time which the law allows for the performance of such contracts. Moreover it is indefinite in its provisions. Furthermore, whatever it was, complainants in 1930 assigned all of their rights therein to Arthur M. Powers. Subsequently they assigned to the Powers Co. all right and claim to everything connected with it or the hydro electric development, and these they do not seek to set aside. It is also claimed that other oral contracts were made covering a period of years thereafter, none of which added in any manner vitality to the so-called contract of 1911.

The so-called contract of 1911 was not made with complainants, but with a partnership. This so-called contract is void for want of autuality, as well as for uncertainty. Moreover it ran as to some matters, viz., the purchase and sale of electric

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The so-culted contract of 1911 was not the maple insate, but with a norther ship. This serested there of in volufor start of autumility, as not as for expect into, december when as to some matters, wis., the surphase no sale of theorem.

current, for a period of fifty years and was consequently obnoxious to the statute of frauds. No breach thereof is alleged as against the defendant Insull. Laches is imputable to complainants for failure to assert a right thereunder within the (Foss v. Pepples Gas Light & Coke Co., 293 statutory period. Ill. 94, affirming the decision of this court in the same orse.) The defense of the Statute of Limitations is available on demurrer. The claimed new promise did not remove the bar of the statute, as the doctrine of new promise has no application to actions of tort which the conspiracy charged in the bill is tantamount to. Nelson v. Petterson, 239 Ill. 240. The so-called new promise is of the same character as its forerunner, and is inoperative for the same reasons. The 1911 so-called contract is futile as a foundation of any liability, if for no other reason than that complainants were not parties to it and for that reason have no legal status empowering them to enforce it. The alleged conspiracy of 1920 presents no triable issue for the reason that all the averments regarding such conspiracy are alleged to rest upon information and belief. A demurrer does not admit facts so pleaded. Murphy v. Murphy, 189 Ill. 360; Grabarski v. Stankowicz, 179 Ill. App. 45, Chilvers v. Huenemoerder, 250 ibid. 499.

Much more might be said in this opinion in review of more of the multitudinous matters set forth in complainants' pleading, but we refrain, because, aside from every other consideration of either fact or law, the releases found in the record are a complete bar to any cause of action which complainants claim against the defendants Insull and Arthur N. Powers. The fact of these releases is not only not denied, but admitted and attempted to be turned for other uses in the prayer for relief,

ourrest. for a porton of fifty years and a a quademantly obmixtons to the sertute of frauds. In ord ob their of he witered was against the telegious lineal subsalet add santege as and aldely talendered to come to the state of the state of the statutory portod. (1988 V. redanks 10 11 1916 10. ILL. 34, afficulty the secietos of this court in the cour of co.) no buttle or he becitarist! To ethout? add to seestob add demorrar, The claimed new creating that recover to be to the strate, as the descrine of new promise has he polication to at fills off of beautiety operation and doing took to enotice tentenous to. Melaga v. Pertirons, 200 ill. 200. The sa-online mer promise is of the same of trainers to its for spaner, and is terretains the for the court include and the first special is futile as a foundation of any limitalry, if for no oner religion to el ci ci ci come and a cor con a con the resect have no legal object ampowering them to entorce it. the mileges acceptions of delig presents no trickle terms top the a r ynatigeon d un grietwelle den bet bût lis tedt soos alleged to rest upon information and believ. I we reer does mot samt facts so loaded. Larby v. white, 143 all 201; Greberati v. "Legensigs, 179 Hit, con. 60, Thilder v. Pronuncia tat, 850 1514. 452.

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to which we will hereafter advert.

There is no reason assigned for setting aside the releases, without restoring the status quo ante. Complainants have made no case warranting the disturbance of the releases. There has been no return of the consideration paid for the releases. No fraud is charged in the procuring of the releases. There is no denial that the releases are good as to the defendant Insull, and as Arthur N. Powers and Samuel Insull are charged with being joint tort feasors, under elementary principles of law, the release of one joint tort feasor operates to release all. Lacking a return of the consideration paid for the releases operates as a confirmation and ratification of such releases.

The releases of Millard R. Powers and Wilbur F. Powers are sweeping releases embracing every thing from the beginning of time until the date of their delivery. It is hard to understand how they could be more complete or conclusive of the final settlement and adjustment of the rights of all the parties involved in the litigation. The complainants for ample and sufficient considerations released and forever discharged, the defendants Insull and Arthur N. Powers, both individually and as a member of the firm of Arthur N. Powers & Co., and scknowledged full payment and satisfaction of all claims, rights and demands of any kind and nature, individually or as an alleged member of said firm, which they "now have or ever have had against said firm and release and forever discharge Arthur N. Fowers & Co., Arthur N. Powers, Samuel Insull, Public Service Company of Northern Illinois, Illinois Light & Power Co. and all or any of them of and from any and all manner of actions, cause or causes of action, debts, dues, sums of money, accounts, reckonings, bonds, bills, wages, salaries, notes, specialities, covenants, contracts, controversies, agreements, promises,

to which we will bereriker alvert.

There is no reston excipact for extring raide the releases, without restoring the utatus one sain. Complainted and have sade no case vertanting the disturb use of the relative net. There has been no return of the consideration prid for the relative has been no return of the consideration of the release. It have it and the charged in the product of the different insuli, and as arthur a. Forers and crawer insuli are a expect result, and as arthur a. Forers and crawer insuli are a expect with being joint town ference, under elementary principles of law, the release of one joint tors I saor operatory return of the recent is raid of the relating a return of the recent is raid for the relation (and to the relative operators as a confirmation of restriction of and relatives.

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Variances, trespasses, damages, judgments, executions, claims and demands, whatsoever in law or in equity, which they now may have or ever have had against the said Arthur W. Powers & Co., Arthur N. Powers, Samuel Insull, Public Service Company, Illinois Light & Power Co., and acknowledge full payment for all interest which they then had or ever had in and to any of the shares of capital stock and bonds of said Illinois Light & Power Co, or in the hydro electric power development, upon, adjacent to or bordering upon any portion of the Kankakee River, for such consideration and value received, both individually and as an alleged member of said firm, hereby sell, assign and transfer to said Illinois light & Power Co. any right, title and interest in and to all maps, plate, profiles, plans, drawings, surveys, records, survey books, reports, appraisals, abstracts of title, deeds, documents, blue prints, drilling records and any and all other papers, data, cause or thing of whatsoever kind and nature which they then had or ever had, for, upon or by reason of any such matters, cause or thing whatsoever, and in and to or relating to said Illinois Light & Power Co., and in and to ita stock and bonds and in and to said hydro electric power development, from the beginning of the world to the day of these presents, and hereby make delivery of all such papers, plats, maps, survey records, survey books, etc. as herein recited" to Arthur N. Powers for the account of said Illinois Light & Power Co. as its interests may appear. There is no charge by complainants of any fraud or untruthful representations made to them to induce them to execute and deliver these releases. They were intimately informed of the whole situation and were presumed to know the legal effect of their execution of such releases. Moreover the complainant, Millard R. Powers, was a lawyer of long standing at the bar of Illinois, so that aside from the

wariander, transpart, can gen, indigenta, arecatoris, areacains, and domends, shatosever in ina or is equity, which they are any have or ever here bed agrinet the said arthur .. Pavers 6 10. Arthur b. comors, Semest Innual, cubite craice Company, Lille to teatest ili tel to segment ad tollacolled to the common to the later of the tell to te to a ride out to you at the had now to bed and types dolde TO to store and bords of a light of the store is the store to. in the hydra siderric paras development, upon, stiscent to or borderlag apon ing partion of the lookable ivor, for and comalderation and walter raceived, both individually and ar an allaged member of said fire, bereby call, as . In and transfer to Fartoful Entrantify , thinks your and there is displace of angelies because in one to will mene, pushe, profites, rinns, rreings, workeys, recorde, suggest because religious contrates of the streets of thise doods, whore earn, blue prints, irliing records and any and the other cap. 20, d. is, became or with, of eleboror sink or as no con-වෙන්. එම වෙන් වෙන්න මෙන්න මෙන්නෙ වන්න නිවේ. එයන යාන්ය එව වන් වන්න වෙන්න වෙන්න TO BE BUT TE BETT OF THE STATE OF THE SHOPE OF THE STATE est of per all man tones and, years, "etany" by earlies -colorah rance, ciriogia orbigi bise of bus al bus elass be inoste went, from the bentening of the world to the dry of these "staic "el ... Gove you all allest alles and and ing all allest end and allest and allest allest and allest allest and allest allest and allest alles many areas areas a constant to the party areas are parent actived. the contract the first that the following the first two first two first two first fi meds of the election of antiphing restaurable of the elections to induce the se secrets revises to increase of men's countries in anath of "Analitical offs of the Anthony of the contract the state , we all the state of the transfer and the state of the s to you all a company this in the company to the termination of the property long standard to be and illinois, we the red out to mailreas and

presumption of law that he knew the legal effect of his act in executing and delivering such release, from his learning as an old practitioner at the bar, he had actual knowledge of the legal effect of his act in executing and delivering such release, and whatever the actual fact may have been, keeping the consideration paid for the release and converting the same rightfully to his own use, and an utter failure to restore the status ouo ante, are effectual bars to disturb in any manner the releases or to change the situation created by their execution and delivery. Moreover no attempt is made to set these releases aside, although a futile attempt is made to have this court treat them as contracts between the parties in matters alien to their provisions and their purport and legal effect. By the averagents of the amended bill complainants have in legal purport and effect ratified and confirmed these two releases in accord with their provisions and legal interpretation of the language in them used to evidence contracts of release. The power of the court does not extend to make contracts for parties, but is limited to construing and interpreting them from the language used by the parties in evidencing the same. The right of parties to be free and untrammeled in the making lof lawful contracts is established by the law of the state and nation. As well said in Clark v. Muir, 298 Ill. 548: "A court of equity cannot substitute a different contract for the one the parties made." It was likewise said in Stone v. Palmer, 166 ibid. 463: "There is no rule in equity that will enable a court to substitute a contract of its own making for that of the parties". It is furthermore patent from complainants' pleading that there is no statement of fact found therein upon which the court would be warranted in maining such a radical change in the releases, which their counsel urge in argument;

presupprish of any test to age, the agest even of his art in executing and delivering such Titles, fice has a will not the old practitioner at the bur, we had setual needed of the servi the savener done writers. I has parturese at too sid to tootte whatever tae sommai fact may have been, louping the countier time ald of tiluidely made all satisfact for each training for blac . same our and an exter to best of exacted rests as the . same and of to searcher end which was all which of base Indicates are change the altestion oranged by teets execution and delivers. describe attempt to made to the on resemble of the material a futile attempt is ende to bare for court terms then a emplainant wheth of malls evalues at potents and more sed significaand their purport and induit of you. If the ever menter of the tonthe ign introde into a mi stand establishers lile between wind dit Armer hi see eler ers randi sprilace ha. Dillist profite end in the relative relation of the estimate grand off to serve with a mediat to storet on agreetive of bear isjini ar judjer'traj tol stortius es a of bustre the seck occupations and interpreting them from the interpret of the el advertant Libert to making of no being acting bus carl har list we address the state of the time of bedshinds THE THE THE THE THE CASE OF SHEET OF STATE OF STATE OF it and likewise sid in dane .. date, to dili. 465: " if the pales it is no rule in equity than the rather than the summer of the constrate and assistant and the decide and assistant and assistant and assistant and assistant and assistant and assistant ass furthermore person from completence "two itse that the tent of the statement of fact found therein unon little the court among and warranted in weigh out a rolle I clea o to the re. neck. survey to the country of the second

law appearing in the averaents of complainants' amended bill, the two releases executed and delivered by complainants are a complete bar to any cause of action against any or either of the defendants in the cause. The complainants have settled their former differences for a sufficient lawful consideration to them paid and received, and which settlement is evidenced by complainants' two releases found in the record. Such releases were binding upon them at the time and they are now attack in equity.

We have made but sparse reference to the wealth of authority cited in the briefs, because, as we view the crucial questions in the case, there is no serious conflict in the authorities or the decisions of the courts supporting the conclusions announced in this opinion.

We are in full accord with the decision of the chancellor that the amended bill does not state a case entitling complainants to any relief against any of the defendants in a court of equity. Therefore the decree of the Superior Court dismissing the amended bill for want of equity is affirmed.

DECREE AFFIRMED.

WILSON, P.J. AND RYNER, J. CONCUR.

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WILLIAM KOTSAKIS.

Appallee.

PETER CRPHAN Doing Business as Chicago Packing Mouse, Appellant. appeal from Deficipal Court of Chicago.

255 I.A. 627

BR. PRESIDING JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in trover to recover the value of certain restaurant equipment and upon trial had a verdict for \$2,000. From the judgment thereon defendant appeals.

A phase of this controversy was before this court in an opinion filed April 13, 1925, (237 Ill. App. 634.) We there affirmed the judgment, finding the right of property in the plaintiff. The property was not returned, and this suit was brought. As stated by the attorney for the defendant, the only question here involved is the market value of the equipment at the time it was taken.

Six witnesses testified, four for plaintiff and two for defendant. There was a variation in the opinions, from \$250 testified to on behalf of the defendant, to \$4500, the value given by one of the witnesses for plaintiff. The jury, having the opportunity to see the witnesses and judge of their intelligence and oredibility and having considered the variant opinions, could properly fix the value at \$2,000.

The defendant suggests that, because the attorney for the plaintiff in the former trial swore in the affidavit for replevin that the value of the goods was \$200, plaintiff is bound thereby in the present action and cannot recover more. This is not the rule. In <u>Martin v. Herts</u>, 224 Ill. 84, it was held that the value of the property stated in the replevin writ and bond is

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there is no evidence to the contrary. In <u>Peters for Use of Econon vs. Brown</u>, 245 Ill. App. 570, it was held that the value given in the replevin bond and affidavit is not conclusive and that the actual facts as to values should be permitted to be shown.

The finding of the jury was well within the scope of the testimony and as there was no reversible error upon the trial the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

only prima facts evidence of value and will provail only where there is no evidence to the contrary. In <u>Poters for Upn of Ecenon vs.</u> Brown, 245 Ill. App. 570, it was hald that the value given in the replayin bond and affidavit is not conclusive and that the actual facts as to values should be permitted to be shown.

The finding of the jury was well within the scope of the testimony and as the e was no reversible error upon the trial the judgment to affirmed.

AFFIRMER.

Estehott and O'Conzer, 44., sencur,

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Plaintiff in Error.

Y8.

Julius Swamson, Defendant in Error. BRROR TO MUNICIPAL COURT

25 I.A. 627

MR. PRESIDING JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover \$587.35 claimed to be a balance due from defendant for a tax payment under the terms of a real estate contract. Upon trial by the court the issues were found for the defendant. Plaintiff asks that the adverse judgment be reversed.

The real estate contract provided for the exchange of real estate between the parties, but we shall notice only the facts with reference to the property conveyed to the plaintiff.

There is no controversy as to the property conveyed to the defendant.

The contract was dated August 31, 1925, and provided that the taxes for the year 1925 should be pro-rated from January 1, 1925, to the date of the delivery of the deed, and if the taxes could not be paid at the time the deal was closed they should be paid on or before the lat day of May of the following year.

John E. Benz was the agent for plaintiff, and the defendant was represented by William L. Wallen & Sons. October 23, 1925, plaintiff, Benz (his agent) and William Wallen, Jr., (agent for the defendant) met in conference at the office of Wallen & Sons to close the deal. It is not clear as to whether the defendant was present at this time. The evidence tends to show that Benz asked Wallen, Jr., to produce the tax bill for 1925 in order to pro-rate the smount. Wallen, Jr., could not do so.

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JULIUS SWANGON

Defendant in Error.

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MA. PARRIPHE PROTICE ROSCHELT. PRILIVERAD THE OPINION OF THE COUNT.

Plaintiff brought suit to recover \$557.55 claised to be a belance due from defendant for a tex payment under the terms of a real estate contract. Upon trial by the court the lesden were found for the defendant. Plaintiff saxs that the adverse judgment be reversed.

The real estate between the parties, but we shall notice only the facts with reference to the procerty conveyed it the Jaintiff.

There is no contraversy us to the property conveyed to the designant.

The dentract was deten august 31, 1925, and provided that the texes for the year 1925 should be pro-rated from somery 1, 1925, to the date of the delivery of the deed and if the taxes sould not be paid at the the the deal was chosen they should be paid on or before the let day of hey of the fallowing year.

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presumably because the tax bill for 1925 would not be issued until the early part of the following year. Wallen, however, produced the tax bill for the year 1924 and plaintiff's testimony is that it was agreed that this bill should be the basis of a tenporary adjustment, the final adjustment to be made upon receipt of the 1925 tax bill; that Wallen, Jr., stated that his client would pay any difference if the 1925 taxes should be larger, and, on the other hand, plaintiff should refund to defendant if they proved to be less than they were in 1924. Plaintiff requested a letter embodying this agreement, but Wallen, Jr., said his parties were reliable and would stand by the agreement. The taxes for 1924 were \$1136.33. Upon the advice of Benz plaintiff acquiesced and the deed was delivered and the deal closed, defendant paying plaintiff \$925.07 as his share of the taxes of 1925 based upon the taxes for 1924. There was other evidence tending to prove that this was the agreement.

Plaintiff entered into possession of the property, and when the tax bill for 1925 was subsequently produced it was for \$1858.38 - much larger than for 1924. This would make the prorated share of defendant \$1512.42, on which he had already paid \$925.07, leaving \$587.35 due from him.

It was also in evidence that these facts were called to the attention of Wallen & Sons by letters; the first dated May 6, 1926, in which plaintiff demanded the payment of this difference; also a letter dated October 7, 1926, in which plaintiff's claim was again stated with a request for the payment of the balance due. A third letter was sent embodying the same demand on October 14, 1926. He replies were made to these letters.

Upon the trial William Wallen, Jr., did not testify, as he was in Florida. It was in evidence that when the deed was issued Wallen & Sons marked the contract cancelled, and it seems to have been the opinion of the trial Judge that this indicated a complete

premuably because the tex bill for 1925 would not be tosued until the early part of the following year. Wallen, herever, produced the tax bill for the year 1924 and pictuiff's centinony is that it was agreed that this bill chemit he the basis of a tenperery adjustment, the final adjustment to be ande upon receipt of the 1925 text bill; that Walley, ir, stated that all all med 2014 to the tente of the cares and the constitution and the other band, claimilf should refund to defection of they groved to be less than they were in 10 4. . inintin' resugeind u letter embedying this egreenett, but wallen, ir., said als parties were reliable and would stand by the egranment. Its lagge for 1984 ware \$1186.39. Oren the maying of light intiff conficency and the dood was delivered and the deal closed, defented paying agra besed 6281 to sexus one to you as old as folder Tilinisis the taxes for 1974. The se was other switches the ing to prove that this was the agreement.

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termination of any obligations or undertakings between the parties. In so helding the court was in error. Ordinarily, the execution of a deed in pursuance of a contract of sale extinguishes the contract, but this is not so where the contract provides for the performance of acts other than the conveyance. Biever v. Hueller, 254 Ill. 315; Gillett v. Teel, 272 Ill. 106.

The decision of this case turns upon a question of fact, namely, whether the parties agreed to settle the pro-rating of the taxes upon the basis of the 1924 taxes, or whether such taxes were merely a temporary basis of settlement, the matter to be finally adjusted when the actual amount of the 1925 taxes should be ascertained. The trial court did not allow the trial to be completed, but announced his decision for the defendant before the evidence was all heard.

We hold that the case should be re-tried; that all the parties should be given an opportunity of presenting their: respective versions of what was said at the conference at the time of the passing of the deed. The testimony of William Wallen, Jr., should, if possible, be procured. If the greater weight of the evidence tends to support plaintiff's version, he is entitled to judgment; otherwise, not.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and O'Conner, JJ., concur.

termination of any oblig tions of undertakings between the marrisa.

In so helding the sourt was in error. Addinarity, the erecution of a deed in pursuance of a contract of side enting stenes the contract but this is not so where the contract provides for the performance of acts other than the conveyance. Herer v. mester, 194 111. 115:

The decists of this case turns upon a constinuit fact, seems, seeming the taxes upon the team of the team, the settlement of the finally adjusted shen the actual amount of the ideal of the ideal of the team of

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Large and C'ogner, dd. consum.

BTHEL D. KEWLEY, Defendant in Error,

VA.

IRVING REAPP and IRVING KRAPP, Doing Business as I. MAPP & CO., Plaintiff in Arror. HRROR TO MUEICIPAL COUNT

255 I.A. 627

ME. PRESIDING JUSTICE RESURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks the reversal of an adverse judgment for \$450 upon the verdict of a jury. Plaintiff brought suit to recover the value of a fur cape which she had delivered to defendant for repairs and which was lost.

Flaintiff originally commenced her action against the Knapp Fur Company. Inc. Subsequently Irving Knapp was made an additional party defendant. In his affidavit of defense Enapp admitted the receipt of the fur cape but pleaded the statute of limitations. Upon trial the Knapp Fur Company, Inc., was dismissed, and the court instructed the jury that, as a matter of law, Irving Knapp could not claim the benefit of the statute of limitations, even though he had first been made a party to this suit more than five years after the loss of the fur cape.

Under the circumstances, could Knapp successfully invoke the statute of limitations as a defense? We hold that he could not.

May 8, 1922, plaintiff delivered her cape to Irving Mnapp, doing business as I. Knapp & Company. Two or three days thereafter Enapp informed her that the cape was lost. May 19, 1922, defendant's business was incorporated under the name of Enapp Fur Company, Inc., Irving Enapp, president. August 21, 1925, suit was commenced against the corporation and susmons was served on Irving

ETHEL D. REWLEY,

defendant in Arrer,

. 37

INVISE REITE and INVISE RAPP & CO. Poing Business as I. Thapp & Co. Plaintiff in Arror.

nascal relations for the country of the contents.

IR. MARSIDING JUSTICA LOSUELLE DELIVERED THE OPILION OF THE BOUNE.

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Enapp. The defendant corporation was defaulted, the case proceeded to trial and plaintiff recovered a judgment for \$700. September 3. 1925, defendant corporation moved that this be vacated and set aside. which was done, and it was given leave to file an affidavit of defense. September 14, 1925, defendant corporation filed its affidavit, sworn to by Irving Enapp, admitting that the defendant corporation received plaintiff's fur cape, and demanded a jury trial; when the case was reached on March 25, 1927, it was not present. After hearing evidence the jury returned a verdist of \$550, on which judgment was entered. On April 6, 1927, defendant corporation moved the court to vacate this judgment, which was allowed. The case again came on regularly for trial on January 20, 1928, when defendant corporation filed an amended affidavit of defense signed by Irving Enapp. in which, for the first time, th was denied that defendant corporation had received the fur cape on May 8, 1922, and asserted that the corporation was not in existence at that date. Plaintiff thereupon, by leave of court, filed her amended statement of claim on February 11, 1928, making Irving Enapp doing business as 1. Enapp & Company an additional party defendant. He was served with summons and filed his affidavit of defense, in which he admitted that he received the fur cape as aforesaid, but pleaded that five years had elapsed since the cause had accrued and hence he could not be held liable.

The mere running of the statutory time is not always a complete defense. Certain exceptions may exist; for instance, Section 22, Chapter 33, Limitations, provides that, if a person liable to an action fraudulently conceals the cause of action, it may be commenced at any time within five years after the person entitled to bring the same discovers that he has such action.

It has been the accepted practice that, where the

betempore sees the leville was religious to the each selfto true and plaintiff received a judgment for \$1. . Suntember 1. 1925, del'andant corporation maved that this be vecited and set mains, and the death, and it was gayed leave of it. a. dans as delike feme. Samiamber 14, 1975, defindrmt corporation films tom affidewit, evers to by Irving knapp, admitting the defendent corneration received plaintiff to fur cape, and demanded a jury total; when the case was remained on . arch 25, 1987, is was not present. After bearing evidence the jury returned a version of \$500, on which judge out was entered. On April C. 1977, ich cor are or arrive mayed the court to vegete then it imment, wild was elleved. The ease again came on remaintly for arial on Josanay 21, 1958, when defendant corporation filed an entired afficarity of declars sinner by Erring Engy, in which for the there there is one on ted that defendant corporation had received the fur cape on way u. 1922, and asserbed that the equipment and may not in extremes as the take. Plaintiff thermoon, by leave of court, filed her succession of of claim on Fabruary 11, 1924, most g. rving inage in the Lasterst as I. Itago e Gospany ao amilitona a tang dal .. u.t. ta sac amped with servens and filed his affiliants of dariones, we attend that well dand becoming due of the end of the end of the challenge of the files on a cast for sevent hed sevent and act and and the . 5 10 - 21 1 / d sd 35 3

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misnower as to the name under which he is doing business, advantage of such misnomer must be taken by a plea in abatement. In Pennsylvania Co. v. Bloam, 125 Ill. 72, it was held that, because of the failure of the defendant to file a plea in abatement, it was concluded by the judgment as if it were described by its true name. To the same effect is Pond v. Ennis, 69 Ill. 341. In Moore vs. The Wabash Railway Co., 219 Ill. App. 574, suit was brought against The Wabash Railway Co., 219 Ill. App. 574, suit was brought against The Wabash Railway Company, whose name was subsequently changed to The Wabash Railway Company. It was held that, since defendant filed no plea in abatement, it could not successfully claim the bar of the statute of limitations.

It would be unconscionable to permit the defendant to prolong this case by dilatory tactics for over five years and then for the first time to claim a misnomer of the defendant.

Irving Knapp was served with summons. In none of his pleas of defense, whether on his own behalf or on behalf of the corporation as president, was the receipt of plaintiff's cape denied but was admitted.

We see no reason to disturb the judgment and it is affirmed.

AFFIRED.

Matchett and O'Connor, JJ., concur.

identity of the defendant is the same, hithough there may be a simperer as to the dead ander which he is deing business, advantage of each missamer must be takes by a pick in anaterant. In Pennsylvania Co. v. Alosa, 125 iii. v2, it was held what, because of the failure of the defendant to file a pick is obserment, it was senciaded by the judgment as if it were described by the true mass. It were described by its true mass. To the same affect is Pond v. Sania. 69 iii. 321. In Appre vs. The Tabach Reliver Co., 219 iii. App. 574, sait was brought against the Wahash Helicad Company, where mass was onbestioned to the Wahash Helicad Company, where nome was onbestiane defendant filled no plan in abatement, it could not secressfully chain the but of the statute of limitations.

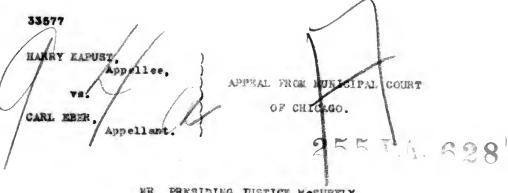
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We see no reason to disturb the judgment and it is

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Matchett sed O'Conner, 71., cencur.



ER. PRESIDING JUSTICE ECSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversel of a judgment entered upon the finding of the court in favor of plaintiff and assessing his damages at \$364.50 and finding against the defendant on his claim of set-off.

September 19, 1927, plaintiff, as lessee, signed a lease of a certain apartment in a building in process of construction at number 1953 Humboldt boulevard, Chicago, owned by defendant, the lessor. The lease was for one year commencing October 1, 1927, at a monthly rental in advance of \$90. Plaintiff paid \$90 on account of the October rent. In his statement of claim he says that the apartment was not in a "habitable condition and ready for occupancy on October 1, 1927; that by reason thereof he was forced to move claewhere. Plaintiff scake the recovery of the \$90 paid for the October rent and also damages claimed to have been sustained for warehouse and noving charges and for moneys paid for hotel board for himself and family, amounting altogether to \$424.50.

Defendant's set-off claimed that there was no breach on his part of any of the covenants and conditions of the lease, yet plaintiff refused to take possession and it then became necessary for the defendant to re-rent the presises, which was not accomplished until Ecvember 15th with ensuing damages.

The decisive question is whether the apartment was habitable on Gataber 1. 1927. There is conflicting testimony



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By this covered upon the finding of the court in fivor of plainjudgment entered upon the finding of the court in fivor of plaintiff and assessing his duanges at \$364.50 and litting equirat the defendent on his slain of ret-off.

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the decisive question is wrether the above entwee

habitable on Concern 1, 1997, June is and the fact that

as to this, but the more believable evidence convinces that the work on the apartment was finished and that the only thing uncompleted on October 1st was a few hours work of painting in the front vestibule. The painting contractor, who tells a consistent story, testified that the flat was complete as to plumbing, radiators, walls, electric light fixtures, and that the only work to be done on October 1st was four or six hours work of painting in the front vestibule. His statement as to the condition of the apartment and building is confirmed by the testimony of other witnesses who had ample opportunity to know the facts.

The evidence shows that the wife of plaintiff started to move in on the evening of September 30th, but when she found there was a smell of fresh paint and varnish in the apartment and also some dirt on the floor left by the workmen she was dissatisfied and forthwith ordered the movers to take the furniture out of the apartment and place it in storage. Plaintiff testified that he took his family to a hotel and made no attempt whatever to rent another apartment for two months thereafter.

Under all the facts in evidence plaintiff was not entitled to recover anything from the defendant, and the finding in this respect was not justified.

To support his claim of set-off defendant testified that after he was informed that plaintiff would not take possession he replaced the rent sign in the apartment and endeavored to rent it; that it remained vacant until November 15th, when he rented it for \$35 a month for the remainder of the term covered by plaintiff's lease. This would make a loss of \$45 for half of November, and \$55 on account of the smaller rental for the balance of the term, or a total loss of \$100. We hold that defendant was entitled

as to tals, but the mere believable evidence convinces that the sork sork as the operation was this sed and for the the only talks undersploted as Gatober let am a few nouse sork of painting in the front vestibule. The minting contractor, who talks: remaining testion story, testified that the first was took to a to removing, resistors, calcified that fixtures, and that the any note to be done on October let was four or six mours were of ontwing an the front vestibule. Als statement to the conficient by the testions of the marked by the testions of other witzesses who had appearing it that the first was the destinant of other

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to judgment on his set-off for this amount and no more.

The judgment is therefore reversed and judgment will be entered in this court that plaintiff take nothing and that defendant recover \$100 from plaintiff on his claim of set-off.

REVERSED AND JUDGEEST HERE.

Matchett and OdConnor, JJ., concur.

to judgment on his set-off for tale amount of an more.

The judgment is therefore reversed and judgment will be entered in this court that plaintiff take net...ing tad that de-feudact recover \$100 from claimfiff on his claim of set-off.

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Matchett and Oddconor, ..., concer.

JOHE A. BALSKEY,
Appellee,

R BELSKEY Appellant.

2551.4.628

OF COOK COUNTY.

BR. PRESIDING JUSTICE ECSURARY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an order allowing her temporary alimony pendente lite of \$20 a week. The reasonable-ness of the allowance is not questioned in defendant's brief, but we are asked to reverse because of alleged irregularities.

The order appealed from was entered by Judge William W. Gemmill of the Superior court, and it is asserted that this was a review of a prior order entered by Judge Walter P. Steffen of the same court allowing \$25 a week for temporary alimony. We do not think defendant's point has merit.

Gemmill. On account of his illness Judge Steffen took charge of his call for a day and entered the prior order. When Judge Gemmill resumed his call the complainant presented the question of temporary alimony to him. The hearing them proceeded before Judge Gemmill not as reviewing any order entered by Judge Steffen, but rather as a continuation of the same matter. The hearing before Judge Gemmill consisted of informal argument, in which all the parties took part. Defendant orally asked that the case be sent to Judge Steffen, but as it was Judge Gemmill's case he could properly deny the motion and proceed with the hearing.

As the hearing drew to a close, and after the chancellor had indicated his opinion, a petition for change of venue was presented by the defendant. It was too late to file such a motion

23545

JORE A. BALRERY,

Appelled

AND ABOUTE WEA

Apreliant.

255 I.I. 628

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after the hearing had commenced. As the petition was dated and aworn to the day before the hearing was had, it is evident that counsel withheld the same until he saw that the court was inclined to decide against him. Under such circumstances the motion was properly disallowed. Richards v. Greene, 78 Ill. 525; Ford v. Ford, 189 Ill. App. 468.

We sufficient reason is presented for a reversel and the order is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

after the hearing had commenced. As the petition was daied and aworn to the day before the hearing was had, it is evident that counsel withheld the same until the saw that the court was inclined to decide against him. Under once circumst here the motion was properly disallowed. Elabelts v. Greener, 78 it. 525; Ford v. Ford, 189 ill. app. 466.

Les rever a roll beautiful no reason to resembed for a reversel.

AVVIHOUD.

hatenert and O'Commor, JJ., concar.

33598

ARTON SZYNCZYK and KONSTANCYA SZYNCZYK, Wis Wife.

Appellees

JOSEPH ANDREW LASECKI.

Appellant.

APPEAL THOM MUNICIPAL COURT

255 I.A. 628

MR. PRESIDING JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, vendors in a contract to sell real estate, brought suit against the defendant who was the holder of the earnest money paid by the proposed purchasers, and upon trial by a jury had a verdict for \$500. From the judgment thereon defendant appeals.

contract with the proposed vendees, Roman Lobojko and Harya Lobojko, to sell them certain real estate in Chicago. The vendees deposited \$500 with the defendant as earnest money. Plaintiffs' statement of claim alleged that the deal was never closed due to the failure of the vendees to consummate the deal, and that thereupon under the terms of the contract the vendors were entitled to the earnest money as liquidated damages. The affidavit of defense alleged, in substance, that the deal was not closed because the vendors did not have title to all of the premises which they undertook to sell.

It is conceded by counsel for plaintiffs that they had title at the time of making the contract to only a one-half interest in the premises and, as stated, in his brief, it was the plaintiffs' theory that they "did not have to have the entire title at the time the contract in question was executed, but that all that was necessary was that the said sellers should have a complete title at the date that the deed was to be delivered and conveyance of the property

33598

ANTON SEYMOSTE AND MONSPANOYA

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## MR. WREEDING JUSTICE ROTERING OF THE COURT.

Plaisiff's, vencors in a contract to sail real estate, brought suit egainst the defendant was was the colder of the earnest money paid by the proposed purchasers, and upon trial by a jury had a versiot for \$500. From the judgment thereon defendant aspends.

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made." Gertain cases, like Evans v. Gerry, 174 Ill. 595, which involved a suit for specific performance, so hold. But this is not a suit for specific performance but is to recover money in the hands of a third party, a stakeholder, which was paid not by the plaintiffs but by the vendess. It is also uncontroverted that, when the venders were informed that the fecord showed they had title to only a half interest, they promised to obtain the other half interest. It is also not disputed that negotiations were carried on for about six months after the contract was signed, but at no time did the venders acquire title to the other half interest, or, so far as the record shows, do anything in this respect.

The contract provided that the purchasers should proceed with the sale by paying a further sum "within five days after the title to the realty above described had been examined and found good, or accepted." The evidence demonstrates that the title was neither good nor was it accepted by the proposed purchasers. Therefore, they never were in the position of default and consequently the only condition under which the vendors (the plaintiffs herein) might be entitled to the earnest money did not happen.

There is no dispute as to the material facts and as upon the record before us there can be no recovery by the plaintiffs the judgment will be reversed with a finding of fact.

REVERSED WITH A FIRDING OF FACT.

Matchett and O'Connor, JJ., concur.

made. Certain cases, like dyans y, Jerry, 174 ill. 595, which involved a suit for specific performance, so hold. Not this is not a suit for specific performance but is to recover maney in the hands of a third party, a stateholder, which was paid not by the plaintiffs but by the vendees. It is also uncentraverted that, when the venders were informed that the record showed they had title to only a half interest, they premised to obtain the outer that is also not disputed that secretarian were currish on for shout six menths after the contract was signed, but at no time did the venders acquire title to the other half interest, or, so far as the record shows, do anything in this respect.

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There is no dispute as to the asterial facts and assembly the pushing the the judgment will be reversed when a function of the fact.

THE RESPONDENCE OF THE PROPERTY AND A STATE OF THE PARTY AND A STATE OF

Estabett and o'Connor, JJ., senour.

We find, as an ultimate fact, that the proposed vendess in the contract referred to were not in default; that the deal failed of consummation because the venders did not have good title to the entire premises described in the contract and made no tender of a good title at any time.

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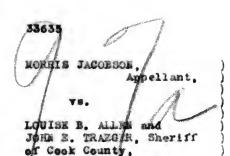
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on . . . We find, as as withmate fact, that the proposed vestees in the contract referred to very not in default; that the deal failed of concumuation because the vendors did not have good withe to the entire promises described to the contract and made no tender of a good title at may time.



Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

255 J.A. 628

ER. PRESIDING JUSTICE MESURELY DELIVERED THE OPICIOS OF THE COURT.

Complainant filed a bill asking for the vacation of a judgment at law against him for \$500 and that a new trial be granted. Upon hearing the chancellor ordered the bill dismissed for want of equity, from which order the complainant appeals.

The gist of complainant's contention is that the placing of the law action upon the trial calendar of the Superior court was contrary to a stipulation made between the parties to the effect that such case would not be placed on trial by either party except upon five days previous notice to the defendants.

Defendants assert that (1) the record shows no such stipulation; and (2) even if there were such a stipulation, the circumstances show that complainant Jacobson's counsel was negligent in not ascertaining when the case was placed on trial.

March 17, 1926, the case of Allen v. Jacobson was reached for trial and it was ordered that it be continued generally. June 28, 1928, the case came on for trial. The defendant Jacobson not being present, the jury found the issues for the plaintiff and returned a verdict for \$500 and judgment for this amount was entered. October 1, 1928, defendant Jacobson made a motion before his Monor Judge Mopkins of the Superior court, to have said judgment set aside. The motion was supported by an affidavit of the attorney for Jacobson, purporting to set forth the facts of the

35655

MORRIS TACORSON

Appellant,

.BY

LOUISE B. ALLSE and JOHN B. TRAKESE, Shoriff of Cook County, Accollege,

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ER. PERBIDING JUSTICS RESERVED.
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Completent of the vector of a bill spring for the vector of a judgment at les against him for \$500 and that a new trial be granted.

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The gist of compinions to contention is that the placing of the law action upon the trial enleader of the lapartor court was contrary to a etiquiation hade between the parties to the effect that such case would not be placed on trial by sither party except upon five days previous notice to the defendants. Defendants severt that (1) the record works no such stipulation: and (2) even if there were such a stipulation, the circumstances show that complained lapohson's councel was assistent in not short increase was clearly on trial.

Sarch 17, 1976, the case of allen v. Jacobsen was reached for trial and it was ordered tout it be continued generally. June 23, 1923, the case case on for trial. The definite Lacobsen set being present, the jury lound the issues for the pinintiff and returned a verdict for 3500 and ju paent for this secunt was entered. October 1, 1938, defendent Jacobsen sade a sotten before his Koner Judge doubling of the Superior court, to have cold (heigh meet set aside. The setten was supported by an affidavit of the attorney for Jacobsen, purporting to set forth the facts of the

matter be continued generally but the defendant's attorney instated that, if this was done, a notice be given him and his client at any time the case should be re-instated and placed on the call. The theory of the motion was that the clerk of the court entered the order continuing the case generally but without any reference to any agreement for notice. That motion was denied by Judge Sopkins.

The present bill was filed upon the theory that the case was placed on the trial calendar in violation of the alleged stipulation for a five days notice.

The court could properly have dismissed the bill upon the ground that the record failed to show such a stipulation.

However, even if there were such a stipulation, the circumstances justify the dismissal of the bill. It was duly proven that in July, 1926, by an order entered by the Executive Committee of the Superior court a calendar was made up of all cases then pending, including cases in which the record showed that a five days notice should be given. The case of Allen vs. Jacobson referred to was on such calendar, but was not reached for trial that year. July, 1927, another such order was entered by the Executive Committee of the Superior court and the case in question was placed upon said calendar and assigned to Judge Lewis of the Superior court. The case was reached in ite regular order and the judgment was then entered.

As stated by the chancellor in giving his decision in the instant case, when a case is continued to be taken up on five days notice, it means that notice must be given if it is taken up at the time the calendar is called; that when cases are continued on five days notice, they are placed on new calendars at the end of the year and re-assigned to respective judges. Such has been the practice for years. Had the attorney for the defendant

occurrence. It shows, in substance, that plaintiff asked that the matter be continued generally but the defendant's attorney instited that, if this was done, a notice be given him and his alient at any time the case should be re-instated and placed on the call. The theory of the spilon was that the clerk of the court entered the order continuing the case generally but without any reference to eary agreement for notice. That notion was denied by Judge accides.

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The case was reached in its regular order and the julgment or court.

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Jacobson paid any attention to the make-up of such calendars he would have seen that his case was assigned to a trial judge and would be called for trial in its order. The failure to notice such orders and calendars was negligence which is chargeable to his client, the complainant herein.

The bill was properly dismissed and the order is affirmed.

AFFIRMED.

Matchett and O'Connon, JJ., concur.

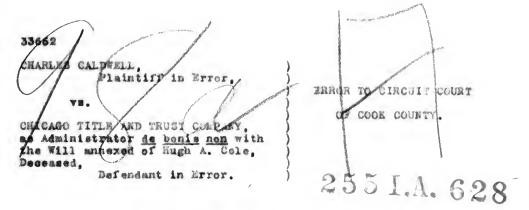
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Market and O'Conton, C., Leherr,



PRESIDING JUSTICE MCBURELY DELIVERED THE OPINION OF THE COURT.

Charles Caldwell, plaintiff here, filed a claim in the Probate court against the estate of Hugh A. Cole, deceased, to recover certain moneys, \$4,000, alloged to have been paid to the decedent, Hugh A. Cole, upon the purchase of twenty shares of stock of the Cole Manufacturing Co., said to have been sold in violation of the Illinois Securities Law. The claim was denied by the Probate court; upon appeal to the Circuit court, after trial by the court without a jury, plaintiff had judgment, from which defendant appealed to he Supreme court, where it was held that the evidence did not prove a sale of stock by Hugh A. Cole to plaintiff, and that the trial court erred in denying the motion of defendant to find the issues for defendant. The judgment was therefore reversed and the cause remanded. Caldwell y. Cole. 326 Ill. 502. Upon the next trial plaintiff introduced additional evidence and the issues were submitted to a jury, which found for the defendant and it was adjudged that plaintiff take nothing. By this writ of error plaintiff seeks the reversal of this judgment.

Hugh A. Cole was president of the Cole kanufacturing Company which had been engaged in manufacturing stoves and furnaces for twenty-five years in Chicago. At one time it was a partnership and at another time it was a common law trust. In 1919 it was

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incorporated with a capital stock of \$1,000,000. W. D. Berry was one of the partners in the business and after the incorporation owned 500 shares of stock and was assistant secretary of the corporation. In about the early part of 1920 Berry contemplated selling all his stock and retiring from the company, and in pursuance of this plan his stock was sold.

of the jury was whether, as claimed by plaintiff, Berry sold all his stock to Hugh A. Cole, who, in turn, sold twenty shares of it to plaintiff; or whether, as claimed by defendant, Berry sold this twenty shares to plaintiff. The jury was evidently of the opinion that plaintiff had failed to prove that he bought the stock from Hugh A. Cole and returned a verdict for sefendant. There was variant and contradictory testimony on this decisive issue, but after giving due consideration to the record we are unable to say that the verdict of the jury was manifestly against the weight of the evidence.

Apparently Berry, after selling out his interest in the company, retired to Florida. He did not testify on the previous trial, but at the present trial his testimony was had, in which he claimed that he sold all of his 500 shares of stock to Hugh A. Cole on February 28, 1920, and a written instrument was introduced in evidence, executed by Cole and Berry and his wife Lena W. Berry, purporting to be an agreement whereby Cole purchased 500 shares of stock in the Cole Manufacturing Company held by William D. Berry and Lena W. Berry at \$200 per share. A receipt for \$10,000 paid on account was acknowledged by William and Lena Berry, the balance of \$90,000 to be paid before April 1, 1920.

The theory of the defendant is that this agreement was abandoned by the parties and that Berry undertook to sell and did sell his stock in small parcels to various employees of the Cole

incorporated with a capital stock of 31,000,000. W. D. Derry was one of the partners in the business and after the incorporation owned 200 share of stock and was manistant secretary of the corporation. In about the carly part of 1820 Barry contempiated sell-ing all his stock and retiring from the campany, and in pursuance of this plan his stock was seld.

The growth of fact presented for the start stand of the jury was whether, as elemed by plaintiff, Ferry rold all his clock to Hugh A. Cole, whe, in turn, sold treaty marres of it to plaintiff; or whether, as claimed by defoudant, harry sold this testify abares to plaintiff. The jury was evidently of the opinion that plaintiff and falled to preve that he bounds are about from Mugh A. Cole and returned a versiot for schedant. There was variant and contradictory testimony on the desire teste, but after giving due consideration to the record we are unable to say that the verdict of the jury was mailinestly appiars. The critical of the fury was mailinestly appiars. The critical of the fury was mailinestly appiars.

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Manufacturing Company, among them the plaintiff. To support this version attention is called to the writing across the margin of this agreement, wherein Cole acknowledges receipt of 500 shares of stock from Berry "for purpose of delivery to the individual purchasers." Also endersed on this instrument in the handwriting of Berry were figures showing amounts paid by various parties for the Berry stock and the amount of stock acquired by each person. This includes Caldwell's (plaintiff's) twenty shares. These endersements total 500 shares of stock, the amount of Berry's holdings, and the aggregate of the amounts paid was \$100,000.

The jury could properly believe that this document with its endorsements tended to prove that, while in the first instance Cole intended to buy all of the Berry stock, yet the transactions in fact were between Berry and the various parties whose names appear endorsed on the document and that the delivery of the 500 shares of stock by Berry to Cole was merely for the purpose of having said shares of stock transferred to the various purchasers indicated by the endorsements of Berry, including twenty shares to plaintiff.

Plaintiff also introduced evidence of two witnesses to the effect that each of them had purchased in March, 1920, from Hugh A. Cole stock in the Cole Manufacturing Company, but, on the other hand, was the testimony of J. M. Thomas to the effect that he bought from W. D. Berry 100 shares of stock on March 1, 1920, and of E. G. Goodchild that he bought 40 shares from Berry on March 2, 1920, and of Edward P. Cole that he bought 75 shares from Berry on March 30, 1920.

The jury could properly believe that Berry's conduct leading to the transfer of portions of his stock to these men was inconsistent with and tended to contradict plaintiff's version that Berry's stock was all sold to Hugh A. Cole, who, in turn, made the

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Caldwell as well as that purchased by Thomas Goodchild and Edward P. Cole was transferred on the stock book directly from W. D. Berry or his wife Lena W. Berry to the various purchasers or their wives on instructions given by Berry to Brelsford, then secretary of the company. The Berry certificates were all given to Brelsford in March, 1920, and Berry received the cash or securities in payment of said shares directly from the purchasers. It was also in evidence that at the time of the last trial Berry had been sued in the State of Florida by several of these purchasers of stock seeking to recover their money paid for the same.

From these and many other circumstances which it would unduly prolong this opinion to narrate, we cannot say that the jury was not justified in returning its verdict.

Plaintiff in his brief next asserts that the court erred in compelling him to re-open his case and introduce further evidence, shifting the burden of proof to plaintiff to show that the sale was not exempted under the Securities Act. This point is not covered by plaintiff's assignment of errors and in any event, as we are of the opinion that plaintiff failed to prove that Hugh Cole sold the stock in question to plaintiff, the error, if any, was not serious.

The court properly admitted in evidence on behalf of defendant some eight certificates in various amounts showing the endorsement and transfer of these to the respective purchasers, endorsed by William D. Berry or by his wife, Lena W. Berry, by W. D. Berry, her attorney in fact. It was also proper to admit in evidence the stubs of stock certificates in the capital stock book showing the transfer of various shares of the Berry stock to Goodchild, Thomas, Caldwell (plaintiff), and Derothy Cole, wife of

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Plaintiff in the printiff in his prior best asserts that the oner straints of the oner orrest in the printiff in the passes of the case and the exemption of the case in the case that the case the case

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Edward P. Cole. While such evidence may not have been conclusive, it was competent to show the entire transaction and as tending to support defendant's theory that the stock purchased by plaintiff was sold to him by Berry and not by Hugh A. Cole. The letter from Berry to J. M. Thomas under date of February 6, 1920, discussing the purported sale of stock to Thomas and its value, was likewise competent.

Complaint is made of the fifth instruction given on behalf of defendant, in that it required the plaintiff, before he could recover, to show that the stock belonged to Hugh A. Cole and also that it was sold to others "in the course of repeated and continued transactions." We may concede: that this instruction is inaccurate as a general statement of the law. Sales may be in violation of the law, although not made by the owner of the stock. However this may be, plaintiff cannot complain of this instruction. His amended claim asserted that Hugh A. Cole was the cuner of the stock in question and this was the theory on which he prosecuted his claim. Furthermore, in instruction 2 given at the request of plaintiff are the identical inaccuracies contained in the instruction given on behalf of the defendant. It is well settled that a party cannot complain of a fault in an instruction, where the instructions of the complaining party are open to the same eriticism. Harney v. Sanitary District of Chicago, 260 Ill. 54.

upon which it is unnecessary for us to comment. The decisive question is one of fact and, if Hugh A. Cole did not sell the stock in question to plaintiff, other questions are not important. We would not be justified in setting aside the verdict of the jury in this respect, and the judgment is affirmed.

APPIRED.

Matchett and O'Connor, JJ., ceneur.

Ndward F. Cols. While such evidence may not have both conditation, it was a mpetent to show the entire transaction and so tending to support defendant's transaction and so tending to was sold to the by Berry and not by Bago A. Cols. the latter iron berry to J. . . Those under date of Ferrary . 1920, discussing the purported sale of stock to Them. wild its value, was illusting occupations.

Complaint is made of the first instruction at sile igned bounds of defendant, in the it required tre parties in interest he bould recess, to show that the stock belonged to Maga a. tolar his tributes to estade out of stade of the sew if this only has gi molimus di la masadis. " " a may del ege dana triz la deration is inaccurate as a central of that of the bar. Dales may be the Tiple in the law, city cape not a daily the coner of the atest. Reverse this may be, whill cheet the control this lastruction. ingangagora af tipo ing malayin anda any mina bina ngalara n na Marig the section of the section of the transfer of given at the sector of wat rul of the their time, incompanies and a second struction it say to be call to all the all the about to the its indicated errol collonions of all limits to distance series river a tadi The instructions of the orang matrices are appropriately for orliteism. darger w. Hapitarr Olabela et Antara, To this, or Live the a for so, or to be hear and to the braids are world to

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FRED C. BEST, Receiver. Defendant in Error,

GEORGE HUGHES and JEAN WILLSON HUGHES

Plaintiffe in Error.

OF COOK COUNTY.

255 I.A. 629

LR. PRESIDING JUSTICE MCSURELY

DELIVERED THE CPINION OF THE COURT.

Defendants seek the reversal of a judgment against them of \$3738.78 entered after their affidavit of merits and pleas were stricken.

The suit was brought on two promissory notes made by the defendants to the order of "themselves" and by them endorsed, in and by which they promised to pay to C. A. Blair & Company, Inc., \$1,000 12 months after date and \$2,000 18 months after date, with interest at 6 per cent per annum. The declaration alleged the transfer and delivery of said notes to the Wisconsin Mortgage & Securities Company before maturity, which transferred them to R. A. Reddeman, who thereafter transferred them to the plaintiff, Fred C. Best, receiver. Copies of the notes were attached which showed that they were secured by a trust deed on real estate in Osceola County, Florida.

The plea which, on plaintiff's motion, was stricken by the court. For insufficiency alleges that the consideration for the notes was wholly failed; that before the notes were made the payer, C. A. Blair & Company, agreed with defendants to sell them certain real estate for the price of \$6,000; that thereupon defendants paid to the seller \$3,000 in cash, receiving a deed; that in the deed conveying the premises the seller, payer in the notes, agreed without cost to defendants to install certain improvements, as follows: "1. Construct or erect wires or conduits

ILB C. BEST, Receiver, Sereit, Sereit,

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for electricity to said lots. 2. Lay water supply mains to said lots. 3. Build concrete sidewalk, curb, and hard surface street in front of said lots. 4. Construct parkway and plant shrubbery as shown on plat. 5. Put in proper sewer connections to said lots." Defendants asserted that the notes on which suit was brought were executed and delivered by them "to secure the payment of a part of said price and upon the sole consideration of the performance of the covenants in said deed contained." It was further alleged that the payee in the notes since the execution thereof had failed and refused to install said improvements and that the subsequent assigness well knew these facts, and therefore defendants desied any indebtedness to plaintiff.

The well known rule is that pleadings must be taken in the sense most unfavorable to the pleader and where the language is doubtful, the most unfavorable construction must be adopted, for the pleader must always be presumed to state his case as strongly in his favor as it will bear. Van Sant v. Rose, 260 Ill. 401. Mere conclusions stated by the pleader are not sufficient. Kadison v. Fortune Bros. Brewing Co., 163 Ill. App. 276. Testing the affidavit of merits by these rules, we find that its allegations of facts do not show failure of consideration. Defendants aver in substance that the payer in the notes agreed to sell them certain real estate for \$6,000, \$3,000 to be paid in cash and the balance of \$3,000 in notes, and that the deal was consummated on this basis. True it is that the defendants after asserting that the \$3,000 notes were given as part of the purchase price also aver that they were given "upon the sele consideration of the performance of the covemants in said deed," evidently meaning the covenants for the improvements. Manifestly, the notes could not at the same time be given as part of the purchase price of the real estate and also as the sole consideration for the making of the improvements. The

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affidavit in this respect is contradictory.

presumption that they have alleged in their affidavit of merite that the cash payment of \$3,000 was paid for the real estate and that the notes for \$3,000 were given solely for the improvements specified. This, of couse, contradicts the allegation of fact that the purchase price of the real estate was \$6,000.

The covenants in the deed concerning the improvements were collateral agreements to be performed at some time in the future. So far as shown by the affidavit of merits, no time is fixed for their performance, which may have been subsequent to the maturity of the notes. The defendants seem to have been satisfied to rely upon the covenants to make such improvements at some future time. They have not offered to reconvey the land nor brought suit to cancel the deed or the notes nor to rescind the transaction. If there has been a breach of the covenants the defendants may recover any damages they may have sustained.

Willets v. Burgess, 34 Ill. 494; Smith v. Vestern Trust & Guaranty Go., 150 Ill. App. 587; and Denzer v. Ecayoy, 224 Ill. App. 359.

The instant plea itself shows a consideration for the notes and that it also attempts to show a breach of covenants with reference to improvements does not make it a plea of no consideration.

Defendants claim that the amount of the judgment is in excess of the ad damnum. This excess evidently arose from the interest accruing between the time the declaration was filed and the time when the case was tried, something over a year. Under such circumstances it has been held that the judgment was proper.

Gradle v. Hoffman, 105 Ill.147; Layman v. Detharding, 106 Ill. App. 594. It has also been held in Grand Lodge A.C.U.W. v. Bagley, 164 Ill. 340, that advantage of such irregularity in the amount of the damages should have been sought by motion made at the time of

affidavit in this res of is contradictory.

Defendants argue in this point income presumption that they have alleged in that officers of agrice and that the cash payment of popular paid of the cold of the cold payment of popular the notes for \$5.000 were given colding for an improvement appearitied. This, or course, posteredicts the allegation of fice that the purchase price of the rule of the allegation.

The coverage is the deed concerning the improvement were collected agreement to be performed at some line in the future. To for as some by the affidavit of derits, no time is fixed for their programmen, which may have deed not be the solurity of the notice. The defendance is to have been astisfied to rely upon the novements to make not in provening at some four time. They have not offered to receive the transaction. After his deed of the mates not to receive the transaction. After his team a line and a coremitation defendants may record any in the core of the coremitation of the factorial states and the defendants may record any in the core and the coremitations of the defendants may record any in the core and the coremitations of the defendants may record any in the core and the coremitations of the defendants may the core of the coremitations. The factor of the core and the coremitations of the defendants may the core of the core and the core of the core and the core of the core and the core of the core

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entering the judgment, thus giving plaintiff an opportunity to amend. Such an amendment would be one of form rather than substance. See also The People v. May, 276 Ill. 332; Boston Store v. Martford Acc. & Indemnity Co., 227 Ill. App. 192.

The judgment was proper and it is affirmed.

AFFIRMED.

Matchett and O'Conner, JJ., concur.

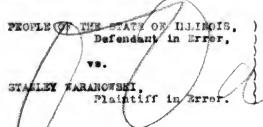
entering the judgment, thus giving plaintiff an appertunity to assend. Such an amenduent vould be one of for rather than oubstance. See also fine People V. Env. 276 lil. 200; besten Store V. dertford Acc. & Ledernity Go., 207 ill. App. 182.

The judgment was proper and it is afficient.

AFFIRED.

Matchett and O'Conner, JJ., concur.





error to criptual court of cook county.

HR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff was found guilty by a jury of receiving stolen property and was sentenced to one year's imprisonment in the House of Correction and to pay a fine of \$1,000. He asks that this judgment be reversed. We are constrained to send the case back for another trial for the reason that it is not clear that defendant was proved guilty beyond a reasonable doubt, and there was improper evidence introduced at the trial.

A merchant, Bernard M. Kanter, on January 5, 1928, about six o'clock in the evening was delivering merchandise from his automobile in the vicinity of number 4533 Hermitage avenue. While he was away from the machine for a short time four boys, William and Hike Chaplick, Walter Moziel and Hike Kasimena, took a satchel and three packages of silk said to be worth \$2500 from Manter's car. The goods were taken by the boys to 4524 South Wood street, and part of them were hidden in the basement and part in the attic. Defendant occupied the first floor at this number, with a soft drink parlor in the front and living rooms in the rear; the boy Kasimena lived on the second floor, and kike Chaplick lived in a cottage in the rear. Both the basement and the attic were unoccupied and were accessible from the outside.

Mike Chaplick, eighteen years old, testified that he and his brother William hid the goods in the basement and in the attic, entering both places from the outside, and when they came

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Plaintiff was found suilty by a jury of receiving stoles property and was sationed; to the year's inperiorment in the squee of Cerrention and to y withen of the care that this judgment be reversed. We are constructed to sead the tesia lan si di tent desert bei tel Islat traique tel fond sens that defender! was crowed willey beyond a responder touch. use thore was in proper and decay fate. At the the time of the

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out Mike had \$5 which he divided up with the others. He denied that he sold the goods to the defendant. He admitted that he divided \$5 with the younger boys and that he had told them that he had sold the goods to the defendant, but testified that this was not true; that he told the boys this because he intended to keep the goods for himself. William Chaplick was not apprehended.

On behalf of the People a police officer, Berounsky, testified that he had a conversation at the station with the boys in the presence of the defendant and that like Chaplick said that he had sold the goods to the defendant for \$10, getting \$5 in cash and was to get the other \$5 later on, but defendant denied that this was true. Statements accusing one of crime are not admissible where the one accused denies the truth of such statements. People v. Harrison, 261 III. 517; People v. Schallman, 275 III. 564.

Walter Koxiel, age twelve, was permitted to testify that when Eike Chaplick came out of the defendant's yard he told the boys that defendant had given him \$5 for the goods and divided the money with them. Such evidence was clearly incompetent.

Improper evidence was introduced without objection, nor is its incompetency asserted in this court.

Defendant testifying denied that he had any knowledge that the stolen goods were on his promises until after his arrest. The police officer testified that, when he called on the defendant, he was given permission to examine the premises and found the goods in the basement; that subsequently defendant notified the police had officers that he/learned that some of the goods were in the attic and they also were recovered.

If, without the improper evidence introduced without objection, we could say that defendant was proven guilty beyond any

out like had 35 walo: he divided up with the states. Le decied that he sold the goods to the defendant, de admitted Lot he divided 58 with the younger boys and that he wested to the hope and that he was that the goods to the defendant, but testified and this was not true; that he total the hope this because he intended to been the goods for almost. William Chapites was not a reheaded.

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If, without the improper estdence indicined int est objection, we could say that defendent san proven unliky beyond may reasonable doubt, we would not disturb the judgment. People t.

Anderson, 239 Ill. 168. But the record does not warrant this
conclusion. A jury should be permitted to consider only competent legal evidence. The case should be re-tried so that only such evidence may be presented, and the judgment is therefore reversed and the cause remanded.

REVERSED AND RELAEDED.

Matchett and O'Connor, JJ., concur.

resconable doubt, we would not disturb the judgment. Feenle b. Anderson, 239 III. 163. But the record does not warrent this conclusion. A jury should be permitted to consider only compatent local evidence. The case should be re-tried so that only much evidence may be presented, and the judgment is therefore reversed and the cause remanded.

. EFFERSED AND REGIARDED.

Matchett and O'Connor, II., concur.

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HAROLD PARDORF, a Misor, by Walter Funderf, his Father and Bext Friend.
Defendant in Error.

DOTILIEG COMPANY, a Corporation, (Defendants).

On Writ of Error of LAWRENCE QUIRICI, Plaintiff in Error. EXECUTO SUPPRIOR COURT
OF COOK COUNTY.

255 I.A. 629

MR. PRESIDING JUSTICE RESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, brought suit for injuries received through the bursting of a glass bottle containing a drink called Whistle, particles of the broken glass striking one of his eyes. Upon trial he had a verdict against the defendants for \$5,000, upon which judgment was rendered. Defendant quirioi sued out this writ of error seeking to have the judgment reversed. His codefendant, Whistle Bottling Cospany, a corporation, was served by publication but, not appearing, an order of severance has been entered and defendant Quirici prosecutes this writ of arror alone.

The evidence is not before us and the only point made is that the declaration fails to state a joint cause of action. The declaration consists of two counts, the first alleging that on June 21, 1923, defendant quiries was in possession of and co-cupied a store at 4700 West 22nd street, Cicero, Illineis, retailing soft drinks, etc.; that the defendant Whistle Bottling Company manufactured and bottled a drink called Whistle and sold the same to retail merchants, and quiries had purchased divers quantities of such drink and had invited plaintist and others to purchase the same; that this drink was manufactured from various ingredients according to a formula then known and used by the Whistle Bottling Company; that one of these ingredients caused the bottles to

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explode on divers occasions; that plaintiff was larfully on the premises of Quirici as a customer, and that it was the daty of Quirici to so operate and conduct his business as to sveid injuring the plaintiff, but quirici negligently, carelessly and improperly handled, shook and otherwise dispensed the said soft drink called Whistle so as to cause the same to explode; that it was the duty of the Whistle Bottling Company not to so manufacture the drink cut of ingredients which would cause the same to explode, yet the company so carelessly bottled the said drink and employed ingredients in and about its manufacture as to cause the same to explode and burst the glass bottle in which the drink had been bottled. In consequence of the several sets of negligence of defendants plaintiff was injured by the explosion of one of the bottles containing said drink, receiving permanent injuries to his eyes.

The second count alleges that the Whietle Bottling Company had been long prior to the date of the accident engaged in manufacturing, bottling and selling said drink called Whistle and for a long period of time had sold said Whistle to the defendant. Quirie; that Quirie so negligently operated his business as to cause one of the bottles containing Whistle to explode and negligently, carelessly and improperly attempted to remove the cap, cork or seal of said bottle, thereby causing the bottle to become shattered and broken.

Counsel for defendant Quiries concedes in his brief that the declaration states a good cause of action against this defendant, but asserts that the declaration does not contain sufficient averments that the two defendants were jointly liable. If the declaration is good as against the defendant Quiries, we do not understand under what rule he may question the sufficiency of

explode on divers occasions; that plaintiff was lastiffy on the prosided of quiries as a customer, and that it was the duty of quiries to so operate and conduct his business as to evold injuring the plaintiff, but quiries negligantly, careloosly and improperly handled, abook and otherwise dispensed the oxid coft drink called Enimies so as to enues the same to explode; that it was the duty of the Whistie Nottling Company not to so manufacture the duty of the Whistie Nottling Company not an englished yet the company no carelessly buttled the sufficient and employed ingredients in and about its manufacture as to cause the same to ingredients in and about its manufacture as to cause the same to explode and hurst the glass bottle in which the drink and been bottled. In consequence of the several acts of negligence of deviants plaintiff was injured by the explosion of one of the teached of the constants plaintiff was injured by the explosion of one of the teached containing said drink, receiving permanent injuries to bis exertices.

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pear in this court to question the judgment. The fact that the declaration charges that both defendants are guilty of negligence does not require proof of a joint liability to authorize a recovery, and if the guilt of one is proven a recovery against him is authorised. Pierson v. Lyon & Healy, 243 Ill. 370; Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249. In an action of tort against several defendants the court may enter judgment against one and permit the suit to be dismissed as to the others. I.C.R.R.Co. v. Foulks, 191 Ill. 57. If in the instant case plaintiff should dismiss as to the Whistle Bottling Company, the judgment against Quirici would be proper. Why, then, should it be improper because judgment is also against his co-defendant, who does not complain?

This case calls for the application of the rule that, after judgment, pleadings are liberally construed in order to sustain the judgment, and defects or omissions in a pleading which might have been fatal on demurrer are cured by verdict, and where issues joined necessarily required proof of facts defectively stated and without which it is not to be presumed that the verdict would have been rendered, such defects or emissions are cured by verdict. Plew v. Board, 274 Ill. 232; Sargent Co. v. Equiple, 215 Ill. 428; Wagner v. C.R.I. & P.R.R.Co., 200 Ill. App. 305; C. & A.R.R.Co. v. Clausen, 173 Ill. 100; Jackson v. Burns, 203 Ill. App. 196; Ressenger v. Wendell, 211 Ill. App. 374. We must assume that the evidence justified the jury in returning a verdict against both defendants and therefore the omission, if any, of apt words

We see no convincing reason to reverse the judgment and it is therefore affirmed.

AFFIRMED.

charging joint liability is cured by the verdict.

Matchett and O'Connor, JJ., concur.

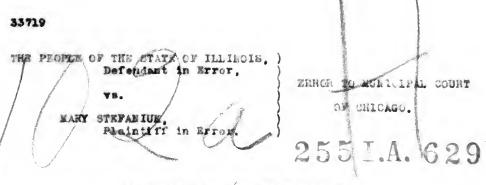
the same as to joint liability, when the co-defendant does not apposer in this court to question the judgment. The fact that the declaration charges that uoth defendants are guilty of negligance does not require proof of a joint liability to anterprize a recovery, and if the guilt of one is proven a recovery against him is authorized. Pleased v. 1900 & Hours, 345 111. 370; Fastel Selegrand-Table to. v. 1900 & Hours, 345 111. 370; Fastel Selegrand-Table to. v. 1900 & Hours, 345 111. 346. In an action of tork actions several defendants the court and enter judgment arainst one dismissed as to the chore. I.C.A.A.C. v. Foulks, 191 111. 57. If is the inclinit case plaintiff should dismiss us to the Shintle Lotviing Josephy, the judgment asise the proper. Why, then, should it be improper actuate fully fullers and applied to some the size against his co-defendant, who does not prepiator judgment is also against his co-defendant, who does not propiator. This case calis for the application of the first proper.

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MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, upon trial by the court, was found guilty of encouraging Anna Villanova, under the age of eighteen years, to become a delinquent child, and was sentenced to imprisonment in the House of Correction of Cook county for the term of six months, and also to pay a fine of \$100.

We are not content to let this judgment stand. Incompetent evidence was heard and the evidence is not convincing beyond a reasonable doubt as to defendant's guilt.

rooms at 11919 Emerald avenue, Chicago; the rooms are rented mostly to workmen employed in the nearby factories; occasionally the rooms are rented to married couples. About one o'clock in the morning of May 16, 1929, Anna Villanova with a man named Verbie rang the door bell of defendant's hotel, to which defendant responded. The man talked to her in Bolish and told her that he and his wife had just come from Detroit and wanted a room. Defendant admitted them, showed them a room and gave them a key. The couple remained in the hotel until about ten o'clock the next morning, when Verbie left, saying he was going for their trunk which was coming from Michigan. About three o'clock in the afternoon of the same day, defendant gave Anna Villanova a newspaper to read and on examining it the latter made some exclamation to the effect that her brother was looking for her. Defendant

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was not husband and wife. She remonstrated with Anna Villanova and maked her why she had told her that they had come from Michigan; the girl then told defendant where she lived and said that she had been away from her home since May 13th. Defendant there-upon ordered her to leave the hotel.

Some of the boarders at the hotel testified. One of them said he had lived there for a year previous to the occurrence in question; that it was a rooming house and occupied mostly by men; that once in swhile there would be a man and his wife; that most of the men are employed at the shops of the International Harvester Company; that during the time he had lived there he had never seen any women coming to the hotel with men other than those that were married. Another witness had lived there for nearly two years and testified to the same effect.

The trial court admitted, over objection, the testimony of a police officer repeating a statement claimed to have been made by Anna Villanova in the presence of defendant. This accusation the defendant denied. Such evidence was inadmissible. People v. Marrison, 261 Ill. 517; People v. Mitti, 312 Ill. 73. The same police officer was, over objection, permitted to testify that the defendant had been arrested before this occasion and charged with pandering. This was reversible error. People v. Reed, 287 Ill. 606. This case who holds that in a criminal case tried by the court "there is no course of sound reasoning justifying a conclusion that a court considering evidence competent and relevant as tending to prove the issue nwhen ruling on the admission of testimony, regards it as incompetent and not tending to prove the issue when finding the fact." There is nothing in the instant record indicating that the court disregarded this incompetent evidence in arriving at its conclusion.

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Fore of the hoarders of the north less like to the sold the said the best lived there for a year excelses to the education; that it was a requisit head and on this died soully by now; that one in weather there would be a subtantial his vife; that most of the stops of the stops in the life; that describe the stops of the stops in the had described there for any some could, that desire the last life are than that there were seen any some could, to the botter life are never than there that were marked. Another will have that the test were marked to the said that the the said that the sa

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We are not convinced that Anna Villanova told the truth. Her testimony in many respects is contradictory. At one time she said that Verbie stayed with her at defendant's house until the following morning; at another time that he stayed only ten minutes. She also testified that defendant sent four other men to her room on the 16th of May, with whom she had intercourse, receiving from each of them \$2, one-half of which she gave to defendant. This was denied by defendant. In view of the question-able character of the complaining witness, we are not disposed to place much credence in her testimony. The facts tending to sustain the charges against the defendant rest on her testimony alone, and in view of the definite denial by defendant we cannot say that they are oufficiently proved.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

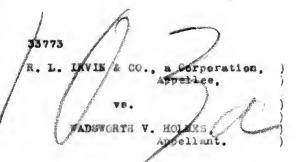
Matchett and G'Connor, JJ., concur.

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APPEAL PRO MUNICIPAL COURT

255 I.A. 620

MR. PRESIDING JUSTICE RESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, as assignee of a promissory note containing a power of attorney to confess judgment, had judgment entered by confession for \$397.50, of which \$60 was for attorney's fees. Defendant moved to vacate the judgment, which motion was denied and he appeals.

It is first contended that the instrument is nonnegotiable in that it does not contain an unconditional premise to
sum
pay a/certain in money. The instrument contains a "schedule and
date of payments." The schedule commences:

\*1 Konth after date......\$3.07
2 Nonths after date......22.59\*

and continues at the rate of \$22.50 a month to and including the words "12 Months after Jate.......22.50." Then follow the words:

\*\$22.50 until paid Time Payment Plan

\$480.57

Chicago, Illineis, Kay 3, 1928.

At the time or times stated in the schedule of payments herein, after date, I or We promise to pay to the order of Schmidt Construction Co. at their office or other place designated by notice, the sums of money stated in said schedule of payments aggregating in amount Four Hundred Righty and 57/100 Dollars for value received, with interest at six per cent per amount after date due on the aggregate amount of this note remaining unpaid."

We do not agree with the contention that the amount which the maker of the note agreed to pay was uncertain and indefinite The Negotiable Instruments Act, paragraph 22, ch. 98, Cahill, provides that "the sum payable is a sum certain within the meaning of

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this Act, although it is to be paid: "" 2. By stated installments; or 3. By stated installments, with a provision that upon default in payment of any installment, or of interest the whole shall become due." Anyone reading this instrument would understand without difficulty that the obligation was to pay \$480.57 in monthly installments; that one month after date, \$8.67 would be due and thereafter an instalment of \$22.50 would fall due each month until the principal amount of \$480.57, was paid. This is the plain meaning of the instrument and while words might have been used to make it more definite and explicit, yet the failure to use such words does not necessarily make the amount of the obligation uncertain and indefinite.

It is next said that the note is non-negotiable because it authorises a confession of judgment with costs and attorneys' fees at any time after the execution thereof, whereas the statute, paragraph 22, allows such costs and attorneys' fees "in case payment shall not be made at maturity." Paragraph 25 says the negotiable character of an instrument is not affected by a provision which authorizes a confession of judgment. The instrument contains the provision that:

"In case of default in the payment of any installment, or any interest or any sum of money which may be due hereon, the aggregate amount of this note remaining unpaid, and every installment thereof shall without notice or demand at once become due and payable, together with interest after default at the highest legal contract rate, exchange and all collection charges, including attorney's fees. And to secure the payment hereof, any attorney at law is hereby suthorized to enter the appearance of the undersigned, in any court of record, at any time after the execution hereof," and to confess judgment for any smount unpaid including attorney's fees.

When the maker of the note defaulted in an instalment, the whole amount of the note becase due. Before that time the stipulation with reference to the power to confess judgment with an attorney's fee was entirely inoperative. The amount to be paid was certain during the currency of the note as a negotiable instrument, and it only became uncertain after it ceased to be negotiable

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by the default of the maker— in its payment. We can perceive no pertinent difference between an amount which has matured by the expiration of the time limit contained in an instrument and an amount which has been declared due because of default in interest or for non-payment of an instalment. There is no reason in justice why in the latter case the creditor should incur the expense of the collection of the note and not in the other. In either case the holder of the note should be reimbursed by the debtor, by whose default suit was rendered necessary and the expenses entailed. This is in accord with <u>Hutson v. Rankin</u>, 213 Pac. (Idahe) 345, where the court said:

"The rule is well settled, by the great weight of authority, that a provision in a note that the whole shall be due, either absolutely or at the option of the holder, on default in the payment of interest, or in the payment of any instalment does not affect its negotiability."

See also <u>Dorsey v. Wolff</u>, 142 Ill. 589; <u>Gehlbach v. The Garlinville Rational Bank</u>, 83 Ill. App. 129.

What we have heretofore said meets the point that the obligation mentioned in the instrument is not payable at a determinable future time. The obligation to pay \$22.50 each month until the principal amount of \$480.57 is paid is definite as to a "determinable future time."

on the ground that it contains a provision not only for the payment of money but is also coupled with other stipulations between the parties. The note recites that it is given in payment of the balance due for paving an alley abutting certain property in Chicago; that the contract for this labor and material was satisfactorily completed; that by the acceptance of the note the payee did not waive his lien upon the premises and that nothing except full payment with costs and expenses should satisfy said lien. These stipulations relate to the transaction out of which the indebtedness arcse, and

by the default of the maker that payment. To can perceive apportained difference between an amount within his interestion of the limit vanished in an instrument with interest and an amount which has veen declared in because of default in interest of far non-payment i an installment. There is no reason in fairfured aby in the latter case the creditor of our the latter case the creditor and not the the mote case the the colour of the mote chould be refer to red by the detect, by where default out; when respired necessary on the colours which is the socer with authorizing an in the latter, by where where the court case in the socer with author a latter, in the court case the

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the statute, paragraph 25, expressly provides that the negotiability of an instrument is not affected by the recital therein of the transaction giving rice to the indebtedness. <u>Metcalf v. Draper</u>, 98 Ill. App. 399; <u>Doyle v. Considine</u>, 195 Ill. App. 311.

Other points are made which it is not necessary to notice, for they rest upon the presumption that the instrument is not negotiable. We hold to the contrary, and that the motion to vacate the judgment was properly denied.

The judgment is affirmed.

AFFIRED.

Matchett and O'Connor, JJ., concur.

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BLIZABUTH KELEUR.

Appillee.

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CHICAGO RAILWAYS COMPANY et al., Appellants. OF COOL COUNTY.

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MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case and on trial by jury a verdict for plaintiff in the sum of \$5500 was returned, upon which the court, overruling motions for a new trial and in arrest, entered judgment.

Defendant seeks to reverse, contending that the court erred in refusing to direct a verdict for the defendant, and insisting that the verdict is against the manifest weight of the evidence; that the damages awarded are excessive and that the court erred in its ruling on the admission of evidence and in the giving of instructions.

The evidence for plaintiff tends to show that on August 11, 1926, while she was a passenger on one of defendant's cars, which was moving in a northerly direction on Clark street in Chicago, plaintiff was injured as the result of a collision of the car in which she was riding with a motor vehicle owned by one Levy. The evidence also tends to show that the collision was sudden; that the car did not change the speed at which it was going prior to the collision; that it was running, as one witness said, "pretty fast," and that there was a great noise at the time the car and motor vehicle came together.

Plaintiff sued the street car company and the owner of the truck jointly, but the jury returned a verdict of not guilty as to the owner of the truck.

Defendant (wisely, as we think) offered no evidence

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CHICAGÓ RAILTAKA COMPANY et al.,

MA. JUST OF RATORSTY DELIVERED THE OFFICE OF YER COURT.

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Timintiff when the etrest int collect the owner of the truck jointly, but the jury returned a certical of not guilty as to the error of the track.

Defendant (winely, as we taink) offered to evidence

The evidence submitted by plaintiff tended to show that she was injured without negligence on her part and as a result of the negligence of one or both of the defendants, but it did not definitely disclose which defendant was at fault. The circumstances just before and at the time of the accident were not presented to the jury. They should have been developed on the trial.

Plaintiff contends here (although such theory was disclaimed in the trial court) that the doctrine of res insalequitur is applicable, citing Chicago Union Traction Co. v. Nes. 136 Ill. App. 98, and Barnes v. Danville St. Ry. Co., 235 Ill. 556. These cases do not sustain this contention. That doctrine is not applicable to this case. The verdict is against the manifest weight of the evidence.

Moreover, the court at the request of plaintiff gave an instruction which has been held reversibly erroneous in the recent case of <u>Kolloy v. Chicago Rapid Transit Co.</u>, 335 Ill. 164.

For the reasons indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND RELANDED.

McSurely, P. J., and O'Connor, J., concur.

The evidence submitted by pisintiff tended to any that one was injured without negligence on her part and as a result of the negligence of one or noth of the hefenicate, but it iid not definitely through which definitely find on the stances just before and at the time of the coefficient were not presented to the jury. They should have less developed on the trial.

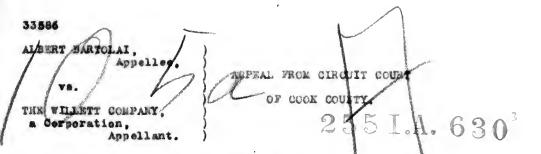
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MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants, The Willett Company and J. Michaels, alleging that he was injured as a result of their joint negligence. There was a trial by jury and a verdict for plaintiff, and damages were assessed against The Willett Company for \$1500 and against Michaels for \$750. Plaintiff then dismissed as to Michaels, and the court, overruling motions of defendant Willett Company for a new trial and in arrest, entered judgment on the verdict.

It is urged that the jury was without power to apportion the damages by its verdict, but the liability was joint and several, and plaintiff under the practice in this state could dismiss as to any defendant before judgment. Lasley v. Grawford, 228 Ill. App. 590; Bordhaus v. Vandalia R. R. Co., 242 Ill. 166.

It is next urged that the averments of the declaration contained no allegation as to the nature or extent of plaintiff's injury at the time the case was submitted to the jury.

The original declaration consisted of four counts. The fourth alone averred the extent of plaintiff's injuries. The first specifically adopted the allegations of the fourth count in this respect. The fourth count was withdrawn before the case was submitted to the jury, but this did not withdraw the statements therein adopted by reference in the first count. Day v. Clarke, 1 A. K. Earshall (Ken.), p. 521.

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Clares, I A. H. Laracall (her.), p. 381.

It is next urged that the court erred in giving the only instruction requested by plaintiff, which was as follows:

"You are instructed that if you find that the plaintiff has proved by a preponderance or greater weight of the evidence that the defendants were guilty of the negligence alleged against them in plaintiff's declaration or and that as a proximate result of such negligence, if any, the plaintiff sustained damages and that the plaintiff was, at and before the time of the accident in question, exercising ordinary care for his own safety, then you shall find the defendants guilty."

It is argued that this instruction was bad because it was in its nature perceptory and because it referred the jury to the declaration for a determination of the negligence alleged therein. Krieger v. A. E. & C. R. R. Co., 242 Ill. 544; Bernier v. Ill. Cent. R. R. Co., 296 Ill. 464; Lerette v. Director General.etc., 306 Ill. 348; Kehr v. Snow & Palmer Co., 225 Ill. App. 403; Westbrook v. C. & K. W. Ry. Co., 243 Ill. App. 446. Although plaintiff contends to the contrary, we think the instruction was peremptory in its nature and does not, as the instructions considered in the Bernier and Westbrook cases, relate solely to the question of damages.

In <u>Kehr v. Snow & Palmer Co.</u>, the Appellate court for the Third district considered an instruction which stated:

"The court instructs the jury that it is not necessary for the plaintiff to prove by a prependerance of the evidence the facts set out in every count of the declaration, but that the plaintiff is entitled to recover if she proves by a prependerance of the evidence the allegations contained in any one count thereof."

After citing Krieger v. A. E. C. R. R. Co., and Bembier v. Ill. Cent. R. B. Co., supra, the court said:

"In the present case the court did not inform the jury as to what facts were alleged in the declaration and the instruction was particularly faulty, owing to the fact that a demurrer had been sustained to two counts."

The judgment was reversed for this and other errors set forth in the opinion, which does not state whether the instruction alone would have compelled a reversal.

In Krieger v. A. E. C. R. R. Co., supra, the instruc-

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tion complained of was:

"The court instructs the jury that if you believe, from a preponderance of the evidence, that the plaintiff has proved his case as laid in his declaration, then you will find the issues for the plaintiff."

The opinion there discussed quite at length the history of instructions given by the courts of this state wherein the jury was referred to the declaration for a statement of the issues. It there appeared that the allegation of the declaration as to the exercise of due care and caution by the plaintiff was defective. The court said that an instruction should not limit the exercise of care and caution of the party injured to the time when he was in danger, regardless of his conduct in putting himself in that position, and after citing authorities to that effect further stated:

"It will be seen from the decisions referred to that if it is proper to give the instruction at all, it can only be justified where the declaration is a complete statement of a cause of action. As the instruction directed a verdict for the plaintiff if he had proved the facts alleged in his declaration, it could not be cured by other instructions."

In Lerette v. Director General, etc., the language of the opinion indicates that a somewhat similar instruction was effered, but the defendant having requested/similar instruction, the same was held in that case not to be reversible.

There is no suggestion in this case that there was any defect in the declaration, nor does it appear that the declaration itself ever came into the hands of the jury. While it is undoubtedly the better practice that an instruction of the court; should state in plain and simple language what the issues are as made by the pleadings, we think it would be hypercritical to hold that under facts such as appear in this record the giving of this instruction was prejudicial. In our opinion it was far less so than are instructions which copy the allegations of the declaration quite at length, thus giving to them the apparent approval

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of the court.

It is also urged that the verdict is contrary to the manifest weight of the evidence and should have been set aside for that reason.

November 4, 1926, at or near the intersection of Des Plaines street, a public highway extending north and south, and Randolph street.

another public highway extending east and west. Plaintiff testified that about a quarter after seven of the morning in question he got off an east-bound Lake street car at Union street and walked over to the north side of Randolph street and then to DesPlaines street, crossing over to the northeast corner of the street to get a cip of coffee; that before he went over to the sidewalk he looked on both sides, which were clear, and that he was walking on the sidewalk when he was suddenly struck by a truck which ran over his right leg; that he did not see the truck before it hit him but that the truck was going north.

Frank Wineberg, the driver of the truck owned by defendant Wichaels, said that he was driving a two and a half ton truck at the time in question north on DesPlaines street, and saw the plaintiff crossing the street and slackened his speed; that the Willett trailer was alongside of him when he got to the corner; that it went a little past him and then pulled out and that the rear wheel of the Willett trailer caught his left front wheel, knocking it out of control and forcing the truck on the sidewalk, where it hit the plaintiff; that as they drove along together the Willett truck was about a foot to his left; that he was driving within one foot of the Willett truck when he saw plaintiff crossing; that there was no room to his left, as by turning in that direction he would hit the Willetttruck; that his truck was alongside of the Willett truck from Washington street to

of the court.

it is also urged the verdiet is contrary to the manifest valuates the cridence and should have been out axide for that reason.

November 4, 1986, at or near the intersection of Dee Flaines atreet, a public highway extending north and south, and handelph atreet, another public highway entending cast and seet. Flaintiff testified another public highway entending east and seet. Flaintiff testified that about a quarter after never, of the merning in question he get off an east-bound lake atreet car at Union street and waired over the north side of Bandelph atreet and then to Destinites atreet, eremaing even to the northwest corner of the street to get a cup of coffee; that before he was over to the northwest corner of the street to get a cup of sides, which were along, and that he was waiting on the sidewalk when he was auddenly atruck by a truck which was auddenly atruck by a truck which has did not see the truck before it hit him but that has the truck was going north.

defendant Michaele, and that he was driving a two and a half ten truck at the time in questich north on Deskielmen etreet, and name the plaintiff arosaing the street and allachened his speed; that the plaintiff arosaing the street and allachened his speed; that the filete trailer was alongaide of him when he got to the corner; that it went a little past him and then pulled out and that the rear wheel of the Willete trailer cannot his left front wheel, knocking it hit the plaintiff; that are his struct on the addwnik, where it hit the plaintiff; that are his drove along together the within one foet of the Willett truck then are no feet of the Willett truck then are foet of the Willett truck then are for the there was no found his tener has not it that there was no for the Willett truck that his the truck of the first was alongaide of the Willett truck from Washington attest to

Randolph street, about a full block; that when he saw plaintiff coming the Willett truck, instead of slackening speed, as he, the witness, did, kept on going, forcing the accident.

The driver of the Willett company truck, Alfred Junquera, testified for defendant to the effect that he was driving in the northbound car track on DesPlaines street at the time in question; that his wheels were directly in the tracks; that Michaels' truck was about three feet from his truck and had been so for about three-quarters of a block; that they were both traveling at the same rate of speed, the truck the witness was driving being a little shead of the other; that when they approached the other side of Randolph street plaintiff sturted coming close and the witness saw that he was going to turn into the car line; that he blew his horn and turning his head around noticed Michaels' truck climbing the sidewalk. He mays that he went about 100 feet more, pulled over to one side and came back as the driver of Eichaels' truck was backing off the sidewalk; that he was 8 or 9 feet north of the corner when he blew his horn; that he did not at any time strike the truck; that he didn't feel any jar at all, and that there wasn't any damage to his truck; that he had at no time prior to the happening of the accident turned his truck to the right; that he remained in the street car tracks all the time.

One Frank Schnell, who also drove a truck for The Willett company, testified that he was in the neighborhood of DesPlaines and Randelph streets at the time in question, driving another truck of The Willett company north about 30 feet ahead of Junquera; that the trucks did not come in contact and that Junquera did not run into Michaels' truck.

Under all the evidence we think the question of defendant's negligence was for the jury. Indeed, the testimony

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of Junquera and Schnell seems hardly consistent with the conceded fact that after driving shead some two hundred feet Junquera returned to the scene of the accident. The jury and the trial Judge saw and heard the witnesses, and we do not disagree with their determination of the facts at issue.

It is also urged that the verdict is excessive. evidence tends to show that after the injury plaintiff was taken to a hospital; that he had a cut above the right eye about 4 or 5 inches long, a bruise and a cut on both hands; that the right leg was swellen and that there were black and blue contusions on it. The treatment given was rest in bed and hot applications of beracic acid. A surgeon put I'rom 5 to 7 stitches in the bruise above plaintiff's right eye and covered it with a bandage, and both hands were dressed with antiseptic bandages. He remained at the hospital two or three days, when he was taken home. His physician continued in attendance, making about 24 visits. Plaintiff was confined to his bed for three weeks and did not return to his work for about one week thereafter. He was earning \$75 a week in his employment and did not receive any salary for four weeks. His bill for medical services was \$150 and he lost \$300 through his inability to work. Unliquidated damages of this sort are necessarily more or less matters of opinion. We do not think amount given calls for interference with the verdict of the jury.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

of Junquera and Mahmell nerme hardly consistent with the sonseled fact that after driving shoed some two hundred feet Junquera returned to the scene of the continut. The jury and the trial Judge sow and heard the mitnessee, and we do not disagree with their determination of the facts at isope.

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RAYMOND MOORE

Appellee,

Va.

MARGARET D. BLISS and JAY P. BLISS, Appellants. APPEAL FROM CERCULA COURT OF COOK SOUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On February 11, 1929, plaintiff, Raymond Moore, caused a confession of judgment to be entered against Margaret D. Bliss and Jay P. Bliss for the sum of \$4156. Attached to the declaration were 17 notes for the sum of \$150 each, dated July 16, 1926, signed by the defendants, payable to the bearer and due consecutively from 14 to 30 months after date, each note bearing interest at the rate of 7% per annum, payable monthly and containing power to confess judgment.

On February 25th thereafter the defendants filed a petition by which they prayed that said judgment might "be vacated, cancelled and annulled and said cause of action dismissed and that your petitioners may have such other and further relief as the law may require and to the court may seem meet."

The petition averred that in the year 1926 defendants borrowed from the Central Manufacturing District Bank, a banking corporation of the City of Chicago, the sum of \$3600; that they entered into an usurious agreement with said bank to pay them a rate of interest in excess of 20% per annum; that in consideration of this usurious lean they executed and delivered to the bank 30 promissory notes for the sum of \$150 each, bearing interest at 7%, payable monthly in consecutive order; that the sole consideration for the execution and delivery of the said notes was this usurious loan of \$3600.00.

RAVEOND MOORES

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MARGARRY D. HILSS and JAY F. HILSS, Appellants,

APPEAL FROM GROUSE TOURS. 1

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D. Bitss and Jay F. Bitss for the sum of 34156. Attached to the

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The petition further averred that Raymond Moore, the plaintiff, was an officer and employee of said bank, and that at all times since the usurious loan was made plaintiff had full knowledge of all the facts in relation thereto and full knowledge that the said loan was usurious; that Moore claimed to be the owner of said notes, which were transferred to him subsequent to the execution and delivery of the same by defendants; that defendants charged upon information and belief that plaintiff was a mere dummy, acting for and in behalf of his employer, the bank, and had no real interest in the notes; further, that the judgment rendered herein was based upon some of the said notes so executed and delivered.

paid, either to the bank or Moore on said usurious loan, the sum of \$1220; that in the month of September, 1927, Moore, claiming to be the owner of certain of these notes, caused a judgment to be confessed thereon in the Municipal court of Chicago for the sum of \$999; that the sum of \$1220 (the said sum of \$999 with interest thereon at 7% being deducted from the original usurious loan of \$3600) showed a balance of only \$1320 etill owing by defendants to the helder of the notes; and that defendants were in no event indebted to plaintiff for more than that amount; that, moreover, defendants tendered to Moore the sum of \$2300 in addition to the amount already paid on said loan, in full settlement and discharge of the same, which plaintiff refused to receive.

After a consideration of the petition the court, upon motion of plaintiff, reduced the judgment entered in the amount of \$900 on account of the judgment theretofore entered in the Eunicipal court on a part of the notes, but denied the motion and prayer of the petition. From that order the defendants prosecute this appeal.

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Plaintiff contends that the setting aside of a confession of judgment is in the discretion of the court; that the petition should be construed most strongly against the petitioner, and that the petition should state facts, not conclusions - all of which are elementary; but the discretion of the court must be a judicial discretion, and it is not easy to draw the line between statements which are statements of fact and statements which are conclusions of fact. The petition does, however, aver that defendants borrowed \$3600; that they gave in the transaction 30 promissory notes for the sum of \$150 each, and that the loan was the sole consideration for the execution and delivery of the notes. This, we think, justifies the further conclusion averred that the loan was usurious.

Plaintiff also contends on the authority of <u>DeWitt v</u>.

<u>Plint & Walling Mfg. Co.</u>, 132 Ill. App. 356, and <u>Eurphy v. Schoch</u>,

135 Ill. App. 550, that the court did not err in denying the motion of defendants because it was too broad; that the motion to vacate the judgment should have been denied, since it should have asked only for leave to plead.

The contention is quite technical. Without questioning the authorities cited we think the prayer of the petition here was broad enough to justify an order opening the judgment and allowing the defendants to plead; and under the facts set up in the petition such should have been the order of the court.

For the error indicated the judgment is reversed and the cause remanded with directions to enter such an order.

REVERSED AND REMANDED WITH DIRECTIONS.

MeSurely, P. J., and O'Connor, J., concur.

feesion of judgment is in the discretion of the court; that the petition anguld be construed mean strungly against the petitioner, and that the petition anguld state feets, not of clustens - sli of which are clementary; but the discretion of the court must be a fulficial discretion, and it is not every to draw the line between statements rules of feets in it feet that statements with are consistents for the perition does, because with as-feetants betreven that the perition does, because, assisted as-feetants betreven the that the perition does, because, assisted as-feetants betreven in the transaction 30 promisery notes for the sum of 3155 even, and that the lean was the sole consideration for the sum of 3155 even, and that the lean was the sole consideration for the further consideration aserred the the ortes. This, we think, justifies the further consideration aserred the the

Finite 5 Talling MIG. Co., 130 III. Ass. asc. and ataly of 2gTitt y.

Fint 6 Talling MIG. Co., 130 III. Ass. asc. and ataly v. 2class,

135 III. Ass. 850, that the court 414 ast err in tolvia. the mation
of defendants because it was too broad: that the v. 100 'o van to

the judgment should have been denied, since it should have about

The authorities cited he which the grayer of the position here was the authorities cited he which the grayer of the position here was broad enough to funtify out order opening the industry at allowing the defendence to ploud; and hader the facts art up to the position such should have been the order of the court.

Vor the arror trained the judgment to trained under such and such and the course remanded with silvertions to water such an arror.

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MeSurely, 2. J., and C'Cornor, v., consur.

33625

JULIAN J. FISHER.

Appellee.

YS.

AMERICAN SAND & GRAVEL CO. a Corporation,

Appellant.

APPEAL PROM MUNICIPAL COURT

OF CHICAGO.

255 I.A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$3170.28 in favor of plaintiff entered upon the finding of the court.

The suit was for commissions alleged to be due on account of said and gravel sold (as alleged) by plaintiff for defendant to the Niles Center Coal and Material Company and to the Norwood Park Coal and Supply Company.

The court found for plaintiff as to his claim on account of the sales to the Miles Center Coal and Material Company and for defendant as to the claim on account of alleged sales to the Norwood Park Coal and Supply Company. Plaintiff has assigned cross-errors in this court.

The evidence shows that during the year 1928 and prior thereto plaintiff was employed by defendant as a salesman on a commission basis, but defendant contends that under the terms of the agreement with plaintiff he was entitled to be paid commissions only on sand and gravel actually delivered. Defendant also contends that the agreements which plaintiff procured from the Miles Center and Morwood companies were invalid because of a lack of mutuality, and that defendant was therefore not liable to pay any commission on account of the same, except where actual delivery was made thereunder.

There is no dispute that plaintiff has been paid

JULIAN J. FISHER.

BY

AVERICAN SAND & GRAVEL CO. . & Corporation.

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of Carcago,

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MA. JUSTICE MATCHETT DELLVERED THE OFICTOR OF THE COUNT.

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his commission for all material sold by him for defendant which the defendant has in fact delivered. The agreement with the Morwood company was "for your entire requirements for season of 1928." That with the Miles Center company was "for season of 1928 for approximately 20,000 yards of No. 2, 20,000 yards of No. 8 and 40,000 yards of No. 8 and 9 mixed. \*\*\* Providing contracts are awarded Niles Center Coal & Building Material Co., requiring this amount of material."

Defendant contends that both these agreements were void for want of mutuality, citing Chalmers v. Bledsoe, 218 Ill. App. 363. This case does not sustain defendant's contention but on the contrary sustains the contention of plaintiff. Also see Williston on Contracts, vol. 1, sec. 104, and cases there cited.

The decision of this point is, however, not controlling. The real question at issue does not concern contracts between defendant and its customers, but raises the question as to the actual agreement between plaintiff and defendant and as to whether that agreement bound defendant to pay a commission to plaintiff upon agreements obtained by plaintiff for defendant from customers in cases where the sale was not consummated by a delivery of the material. The contract of employment between plaintiff and defendant was oral. Mr. Alder, president of the defendant company, with whom plaintiff says his verbal contract was made, testifies that the agreement was that commission should be paid to plaintiff only upon material actually delivered. He testifies further that Mr. Thomas, sales manager of defendant, made the agreement with plaintiff. Thomas testifies positively that the agreement was that plaintil' should be paid a commission only where actual shipment was made on the orders which he obtained.

Plaintiff testifies that he made no agreement that he

his cormission for all naterial sole by him for the reactive of defendant has in I of delivered. The are for the tree of wood company was "for year entire require. The tensor of 19.88." That with the factor company see "for tensor of 19.88 for approximately II, 19.9 the of so the factor of 19.88 for approximately II, 19.9 the of so the factor of the

Pofer and contends that both these agreements report void for want of matematry, citing Chalmers v. oluhos. Its ill. app. 263. This case do a not catan defend at a centention but on the contrary america as antwelled of plantiff. Also see willisten us Contracts, vol. ), sec. ich, and asses there eiter.

the decision of only point is, agrees, not con-The real question at lease does not convers too add trollians. be molitarup and to antima tod anemar an edition timpostof meswand of grant Incharace him litigated area wind facultary inties and at The ther that arregions be not defendant to buy a perul ston to tures to to Tiluarrio ed businedo estruteren nego Tiliniale from customers in cases where the sale has not conden the by a delivery of the meterical. The contract of early man ' becream plaintii and defendant was arel. in Alter, present of the defendant timpany, while soom of alaciff soom hits or so it is not not a was misse, thoughthen thet the any accept: " o they becaute -9010 Lin Lin for it to a some gran Y lantale of him of plane de lostifico l'artilet l'act di, sherve, el les de l'artilet de descrip The state of the s and given no a constant flating the said and from any and incl war per an area of the said and the restaurance of the said per and the said of the said o .beminst.

should not receive any commission unless delivery was made, but he (as all the witnesses on this point) testified to conclusions rather than to what was actually said at the time plaintiff was employed. Asked upon cross-examination if ever during the entire course of his employment he had been paid for sand and gravel never delivered, plaintiff replied, "No, sir, I do not recall that I was. I said I had been working as a salesman a matter of six years." Plaintiff was further cross-examined as follows:

"The Court: During the course of that six years did you ever cause contracts between American Sand and Gravel Company and their customers for a period of time say, for a season or something like that before you entered into these contracts?

A. As I recall, I did in the case of Norwood Park Coal and Supply Co.

Q. Were you paid for entire amount of contract or for

sand and gravel that was actually delivered?

Mr. Carlson: I would like to enter an objection. That happened to any particular contract or sale that might have been agreed on between plaintiff and defendant here would have no bearing whether he is entitled to recover.

The Court: Show a course of conduct, that is what I am

questioning witness to accertain.

The Court: Did such occurrence ever happen?
A. No. sir. I was paid on all material actually

A. No, sir, I was paid on all material actually delivered."

It therefore appears from the testimony of plaintiff himself that in the usual course of business between the parties he had been paid a commission only in cases where actual delivery had been made upon orders taken by him.

Plaintiff cites Kahn v. McGready, 180 Cll. App. 325, to the point that the burden of proving non-delivery was on defendant. This rule of law is not disputed, but the evidence here shows conclusively that delivery was not in fact made of the material on account of which the commissions are claimed.

Plaintiff cites cases to the proposition that plaintiff was entitled to his commission whenever a valid and binding contract enforceable between the parties was made through his efforts. Eachem on Agency, 2nd ed., sec. 1512; Thompson v.

should not receive any countries and an interest ran made, it, an levely to be lived the addl at an anancist odd tim un) of new Tribus to evic on the brus grantes, new feets of many westers employed. Asked appr orose-emmiration ! writ juries the onbut same at the start had an anappague wid to werups ould were never delivered, claintel realied, de al com de rocall that I was. I said I had been to all in a read of matter of six years, " Louis il il was lively as we wante as follows:

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Frelinghuysen, 191 Ill. App. 204; Sackett v. Centaur Motor Co.,
189 Ill. App. 372; Monroe v. Snow, 131 Ill. 126; Fox v. Ryan, 240
Ill. 391. In the cases cited the plaintiff seted as a broker in
escuring a sale of specific property; they are clearly distinguishable from cases like this, where a salesman is employed generally
to sell goods upon commission. Stockton Commission Co. v.

Marragansett Cotton Mills Co., 11 Fed., 2nd ed. 618.

As already stated, the controlling question here is, what was the actual agreement between plaintiff and defendant, rather than any question as to the terms or validity of agreements made between defendant and its oustomers. Plaintiff failed to prove an agreement whereby he should receive a commission upon orders taken where the goods were not in fact delivered.

The judgment entered is contrary to the facts and against the law, and it will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

Fredingheyses, 191 Hil. App. 204; Depart T. Genter Meter Co.,
189 Hil. App. 272; Mearce v. Smow, 131 Hil. 120; Mon v. 19m., 240
Hil. 391. In the cases cited the plaintiff acted as a broker in
securing a sale of specific property; they are obserly dettinuish.
Allo from cases like this, where a salectant is ampleyed generally
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the sell goods upon equalization. Department is a discounting to the factor Mills Co., 11 Fed., 2nd ed. 610.

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GROWD AND REACHDED.

McMarely, P. J., and C'donner, J., denour.

33717

PROPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

T4

JOHN CANNON,
Plaintiff in Error.

court of chicago.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

An information filed against John Gannon June 21, 1929, charged a violation by him of section 4 of an act entitled, An Act revising a Law, Relating to Deadly Weapons (Smith-Hurd's Ill. Rev. Stat. 1929, chap. 36, sec. 155, p. 986.)

Defendant waived a jury and entered a plea of not guilty, and a motion in his behalf to suppress certain evidence was made but denied. Evidence was submitted. There was a finding of guilty with judgment thereon and a sentence that defendant pay a fine of \$1 and be committed to the house of correction for three months.

A motion heretofore made by the state's attorney in this court to strike the statement of facts has been denied. That motion is renewed, and the only points in the brief for the state relate thereto. The motion having already been passed upon, we will not review our former decision.

It is urged in defendant's behalf that the allegations of the information are not supported by the evidence, first, in that it fails to establish that the defendant carried on or about his person a leaded revolver; secondly, in that there is no proof that defendant did not come within the exceptions of section 4, and was not a sheriff or other officer engaged in his official duties, and, thirdly, in that the evidence does not establish the guilt of

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Defendant in Orror,

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John Carvon.

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An information tiled of the folk larmen fune 21. 1970. charged a violation by him of sections 6 of an act matified, an Act revising a Law, Baireing to benefity empower ( atth-first a 112. Nov. Stat. 1929, stry. 25. acc. 155, pr Stat.)

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and a merican in his principal to suppress corporate which and or suility but denied. The corporate was submitted to suility as something of the corporate and a secretary payer and a secretary fudgment thereon and a secretary to the corporate of corporation for which countries.

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defendant beyond reasonable doubt and the State failed to prove the venue.

The record shows that certain officers upon the hearing testified that they saw defendant Cannon and Louis Bravernan walking from the exit of a hotel toward an automobile; that Cannon entered the automobile and sat down behind the steering wheel; that Braverman was walking toward the automobile; that the officers saw that the automobile did not have a state license or a city vehicle license attached thereto; that they thereupon approached the car and talked to Cannon and Braverman; that one of the officers saw Cannon, who was sitting in the car, remove something from his pocket which he dropped on the floor of the car, and that thereafter the officers searched braverman and found a pistol; that thereafter the officers searched Braverman and found a pistol in his pocket, whereupon Gannon and Braverman were arrested and booked for carrying concealed weapons.

This appears to have been all the evidence offered against defendant. There was no evidence showing that defendant was not a sheriff, coroner or other officer within the exceptions alleged in the information, but we think it was not necessary for the State to prove these negatives. People v. Eartin. 314 Ill. 110:

People v. Earnes, 314 Ill. 140: People v. Callicott, 322 Ill. 390.

It was, however, necessary for the State to prove that defendant was carrying a pistol, revolver or other firearm and that the same was concealed on or about his person. The evidence fails to establish that the "something" which defendant removed from his pocket and dropped upon the floor of the car was a pistol or other firearm, unless it can be said that that fact could be inferred from the statement that upon the search of the floor of the car the officers found a pistol. The evidence does not state, however, that the pistol that was found was the "something" removed from

defendant beyond reasonable doubt and the Stite failed to prove the verue.

testified that they can defendent Cannon and could Bravernan waising from the exit of a hotal toward an automobile; that Cannon entered the automobile; that Cannon entered the automobile; that the sterring wheel; that travernan was marking toward the automobile; that the efficars can that travernan was maiking toward the automobile; that the efficars can that the automobile did not have a state blower or a city venicle the automobile did not have a state blower or a city venicle license at all the automobile did not have a state blower or a city venicle and talked to Cannon and bravernan; they one of the efficars and that the estimation in dropped on the floor of the car, recore sementing from his pooket the efficient searched the floor at the floor of the efficient and the floor at the efficient content of the efficient content of the efficient content and from a placel; that thereoffer whereavern were stressed as careful to his pooket.

This appears to have each all the evidence offered against defendant. There eas no evidence aboring that defendant was not a aborder, coreser or expert election are snowpitted al-leged in the information, but we think it are not recovery for the distance to prove these negatives. Papers v. Martin. 114 ill. 110: Papers v. Barrin. 114 ill. 110: Papers v. Barrin. 114 ill. 140: Papers v. Galliewij. 114 ill. 140: Papers v. Galliewij. 115 ill. 140.

Is was, normer, however no live in the first or other first and that the same and that the same was cancerdad on as about his section. The section was cancerdad on as about his section. The section that the section that the same was and drawed upon the files of the war was a single in the first of the war was a single in the first of the same. The single in the test of the files of the same of the files of the car that the single of the files as well and the single of the files as well and the single of the files as the car the car the single of the single of the files as the

defendant's pocket and dropped.

Ecrever, the State failed to prove, if such was the fact, that the transaction occurred either within the County of Cook or the State of Illinois. There was no proof of the venue unless it may be said it might be inferred from the petition to suppress which was not offered in evidence; and for this reason the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

MeSurely, P. J., concurring: I concur in the conclusion but not in all that is said in the opinion.

Officener, J., dissents.

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Offinner, J., discover.

MR. JUSTICE O'CONFOR Dissenting: In my opinion the judgment ought to be affirmed. I think the evidence shows beyond any doubt that the "something" which the defendant removed from his pocket and dropped on the floor of the car was the pistol which the officer immediately found on the floor of the car. I am also of the opinion that the evidence was sufficient to prove the venue that the defendant was arrested by the police officers in Chicago. The defendant filed his petition to suppress the evidence on the ground that he was searched by the police officer without a warrant and a revolver found. In his petition he swore that he "was apprehended and stopped by certain police officers in the employ of the City of Chicago under the supervision of one Sergeant Warren, employed by the police force of the City of Chicago," and he again refers to "the officers in the employ of the City of Chicago." etc. The evidence, which is written up in narrative form, states that two officers testified that they saw the defendant walk "from the hotel towards the automobile." that the defendant, John Cannon, entered the automobile and sat down behind the steering wheel; that the officers saw that the automobile did not have a state or city license attached; that thereupon they approached the car, found the revolver and made the arrest as testified. The evidence shows that the officers were police officers of the City of Chicago, and the presumption ought to be indulged that they were performing their duties where alone that had a right to perform such duties, namely, in the City of Chicago. In People v. Huffman, 325 Ill. 334, it was said (p. 335): "While it is not necessary that any witness should testify in so many words that a crime was committed in a certain county in order to establish the venue, (People v. Shaw, 300 Ill.451) and the venue can be proven by circumstances, (People v. Farnsworth, 324 Ill. 96) yet when circumstances, alone, are relied upon for such proof, the circumstances must be such as to exclude every reasonable

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hypothesis other than that the crime was committed in the county in which the venue is laid in the indictment." In the instant case we think every reasonable hypothesis other than that the crime was committed in the City of Chicago is shown by the facts and circumstances above stated. Sullivan v. People, 122 III. 385, 387.

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33724

TAYLOR WASHING WACHINE COMPANY,

Appellee,

JOHN SCHASCHL.

Appellant.

OF CHICAGO

255 I.A. 631

ER. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, John Schaschl, from a judgment against him in the sum of \$140, entered upon the verdict of a jury which was returned upon the direction of the court.

We evidence was offered or received either on behalf of the plaintiff or the defendant, and the sole question to be determined is whether, under the admitted facts as established by the pleadings, plaintiff is entitled to recover.

Plaintiff in its statement of claim avers that there is due to it the sum of \$140, being the unpaid balance of the price of a washing machine sold and delivered to Mrs. John Schaschl on August 20, 1928. It avers that on that date Mrs. John Schaschl was the wife of John Schaschl and that they resided together as husband and wife in Chicago, Cook County, Illinois, whereby they became jointly and severally liable to plaintiff for family expenses by virtue of section 15, chapter 68 of the Revised Statutes of the State of Illinois.

It appears that the husband alone was served; that he appeared and demanded a trial by jury and filed an affidavit of merits, stating that his defense was that the washing machine was sold to his wife under a conditional sales agreement without his knowledge or consent; that immediately upon ascertaining the alleged purchase he notified plaintiff that the washing machine had been purchased without his knowledge and consent; that he was unable to

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pay for the same and offered to return it to plaintiff in the same condition it was at the time of the delivery thereof; that plaintiff refused to accept the return of the washing machine and that he, defendant, stored the washing machine for the benefit of plaintiff and "was at all times and is now ready, willing and able to return the said washing machine to the plaintiff in the same condition that it was at the time of the delivery thereof."

The affidavit of merits denied that the supposed sale came within the purview of said section 15, chapter 68 of the Illinois statutes, as alleged, or that defendant was indebted to plaintiff in any sum whatever.

No appearance has been filed in this court by plaintiff.

It is difficult to understand upon what theory the trial Judge could have directed a verdict for plaintiff since the affidavit of merits set up a complete defense.

The judgment aust be reversed on the authority of Robertson v. Warden, 197 Ill. App. 478, and Blackstone Shop v. Ashman, 250 Ill. App. 401, and the cause will be remanded for trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

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JAMES A. CARTER.

Appellee.

AND THE PERSON NAMED IN COLUMN TO PERSON NAM

WILL HOWRLL & ASSCRIATES, a Corporation, Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

255 I.A. 631

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of \$450 entered upon the finding of the court.

The statement of claim avers a balance due in that amount for services rendered in securing advertisements for a golf tournament program. It also avers an account stated between the parties.

The allidavit of merits asserts an agreement between plaintiff and defendant to share equally the profits derived in printing the program; evers that defendant was to finance and lay out the program and the plaintiff was to assume the responsibility of selling sufficient advertising to make the venture a success and to devote all his time to it, which he failed to do.

Evidence was submitted by both parties. It appears therefrom that there was no dispute as to the terms of the contract nor as to the averment of plaintiff that defendant in part failed to comply with his premises with reference to securing the advertising. After the transactions were closed defendant wrote a letter to plaintiff and made a statement of the outcome of the venture showing net receipts of \$4405.42, cost of printing amounting to \$2091.33, commissions paid amounting to \$572.75, leaving a balance fue of \$1,741.34, of which plaintiff's share was stated to be \$870.67. From this sum two collections made by plaintiff amounting to \$140 and a further sum of \$130 due from plaintiff to defendant for two months' rent were deducted, leaving a balance due to

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defendant of \$600.67. This statement also charged against plaintiff on account of "Mount Vernon Country Club" am item of \$450.00, leaving a balance of \$150.67, for which a check was enclosed.

It is admitted that the item as to commissions paid is on account of payments made to parties employed to complete the work which plaintiff undertook to do, and he makes no objection to the allowance of that item.

The evidence discloses that the item as to \$450 with reference to the Mount Vernen Country Club concerned a matter which was in no way connected with the contract upon which plaintiff suce, and the court held that, in view of the pleadings, evidence tending to show that plaintiff was indebted on that item might not properly be received. In the absence of a claim of off-set defendant could recoup, but a recoupacent must arise out of the came subject matter and transaction as that suce on. Bostrom v. Bocker, 172 III. App. 410. This item did not arise in that way.

The defense which defendant acught to interpose was not set up in his affidavit of merits, and evidence of it was therefore properly excluded by the court. Cooper v. Anderson, 246 III. App. 1.

The judgment is therefore affirmed.

AFFIREED.

MeSurely, P. J., and O'Connor, J., concur.

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JOHN A. ANDERSON,
Defendant in Error.

THERON P. COOPER,
Plaintiff in Error.

ERROR TO SUPERIOR COURT

OF COOK COUNTY.

255 I.A. 631

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, as assignee of a lease demising certain premises in Chicago, brought suit to recover \$4500 claimed to be rent due under the lease, against defendant, who had guaranteed the payment of the rent. There was a verdict and judgment in defendant's favor and plaintiff prosecutes this writ of error. At a former trial of the case, at the close of plaintiff's evidence, there was a directed verdict in favor of the defendant. Judgment was entered on the verdict and an appeal prosecuted to this court, where the judgment was reversed and the cause remanded. Cooper v. Anderson, 246 Ill. App. 1.

A preliminary question is presented by the defendant in its brief, i. e., that the bill of exceptions not being presented within the time fixed by the trial court is improperly in the transcript of the record before us. A motion was heretofore made by the defendant to strike the bill of exceptions from the record on this ground and the motion was denied. That disposes of the matter. However, there is no merit in defendant's contention because the time for filling the bill of exceptions in the trial court was extended by stipulation of the parties.

Locff v. Taussig, 102-Ill. App. 398; Hawes v. The People, 129
Ill. 123.

The record discloses that plaintiff was claiming rent for the period from February 1, 1919, to August 1, 1920, at the rate of \$250 a month, payable monthly in advance on the first of each and every month. The instant case was commenced

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on July 21, 1920, and the record discloses that the case was passed from time to time. Meither party seemed to be desirous of trying the case. The first trial was commenced December 15, 1926, and the verdict and judgment rendered the next day, more than six years after the suit was brought. On March 2, 1927, the record on appeal was filed in this court. The reply brief was filed July 5, 1927, and our opinion reversing the judgment and remanding the cause was filed October 10, 1927. On hovember 16, 1927, the remanding order was filed in the trial court; and on December 29, 1927, counsel for defendant moved the court for leave to file an amended affidavit of merits, in which he sought to set up (1) that there was no valid assignment of the lease to the plaintiff: (2) that there was no default by the tenant in the payment of rent; and (3) that on February 4, 1919, the defendant was released and discharged of all liability by the payment of \$1,000 and the transfer of certain furniture. The first and second grounds just mentioned were not in defendant's affidavit of merits on file when the case was tried the first time but the third ground was. In the special count plaintiff had alleged that he was the owner of the leasehold interest by assignments and attempted to make them a part of the declaration by attaching them as exhibits (which obviously could not be done. Plaw v. Board. 274 Ill. 252.) He also alleged the default in payment of the rent. On the first trial plaintiff sought to prove the allegations of the special count by introducing oral and documentary evidence, and at the close of all his evidence the court held the proof was insufficient and directed a verdict for the defendant. The holding of this court on the appeal, as shown by the opinion filed, was that since defendant in his affidavit of merits had set up as his only defense that he had been released from his liability by the payment of the thousand dollars and the turning over of the furniture, he was limited to that defense, and the allegations of plaintiff that

see July 21, 182, and the record discussed this all its reas from time to time. Activer purty meeted so be sections of trying the case. The first trial was commenced December 15, 1545, ...d [ ... vertice and judgment resident the new day, not a high six years after the soft was broadet. On arch 4, 1907, or recent an acreal was filed to this cours. The reals brick was filed all 5, 1987, and our opinion reversity the judgetti and remains the gause was Miled Catober 19, 1977. On acrember 16, 1927, the remeding order was filed in the trimi nourt; and on December 1, 18 'V, councel for firshirts telemas he sill of ever I to true out beyon too real of merics, in which he sought to set up (1) the' there was no early -sh on sew armit take (E) : This less of seed out to teampiage fault by file ten is in the bir percent of rest; wit that on february d. 1914, the defendant was released and discussed to all its little. by the payment of \$1,000 and the cransfer of certain furners. The a condense and grounds for temperature are some for the farth affidavit of mer to this when the deep was tried : a lively disc but the tiry gramm was. In the entertal count of antiff had allagat that has go are the order to the control and sad that beyon and attempted to make them a part of the feditation by articular them as ambibits (ander obviously could not be due. Man y, out, 274 III. 332.) He also witemed the default in pa ment of t : want. On the tire, trial pisinily rought to prove the allegation of the de est concerta van superior bre into antique salve by de formation and est est concerta value of the est concerta value o the elect of the wilderes the court of the project of To , information as well-of the the the color of the family the family the first the family the first the family the fami this cours on the appear and are proved by the not no study winds defendant in Life officials as worth to be up as also only defense that he is theer released from his bladellry in the constant of the increased delline and the turbing over or the incitore, are was linksof to that defends, the the silver we will be the he was the owner of the leasehold interest and that there was \$4500 rent due and unpaid stood admitted of record.

The plaintiff, in opposing defendant's motion for leave to file an amended affidavit of merits, filed an affidavit that if the defense set up in the proposed amended affidavit of merits had been filed when defendant filed his pleas, he would have obtained the deposition of Richard T. Haines, and made proof of the allegations of his declaration. Haines then being a resident of Chicago; but that Haines, whose deposition would have been taken to make such proof, was then absent from Chicago and the proof could not be made otherwise.

we think the court erred in refusing defendant leave to file the amended affidavit of merits. On the first trial plaintiff sought to make proof of the facts as alleged in his declaration, but Haines was not called nor was his deposition taken. Both parties assumed on the first trial that the burden was on the plaintiff to make proof and it was only after the opinion of this court was filed that it appeared that the burden was on the defendant. But in any event, we think the judgment entered in the present trial must be affirmed.

Plaintiff contends that the court erred in admitting improper evidence on behalf of the defendant. On the trial the defendant assumed the burden and offered evidence tending to show that some of the rent claimed by plaintiff had been paid. This was admitted over plaintiff's objection and he claims this was reversibly erroneous. We think plaintiff is not in position to urge this contention. The record discloses that defendant offered in evidence three items shown by the books of McLane & Co., who were agents of plaintiff in renting the premises and collecting the rent. Counsel for plaintiff objected to this, but upon being overruled he stated:

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he was the owner of the learehold interest and that there ras \$4500 rent the and unpaid stood admitted of renord.

The plaintiff, in opposing defendant's metion for leave to file an amended affidavit of merits, filed an affidavit of that if the defense set up in the proposed amended affidavit of merits had been filed with the orientant filed attracts, he would have obtained the deposition of Michard T. maines, and made proof of the allegations of his declaration. Asings the being a restant of Uniongo; but that daines, where deposition would have been taken to make such proof, was three deposition uniongo and the proof could not be made concretes.

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entitled to prove payments of rent under the general issue."

Having taken this position on the trial he will not now be permitted to shift his position and say that the evidence was improperly admitted.

court improperly instructed the jury, and the abstract sets forth only the two instructions complained of; it does not purport to abstract all of the instructions. An examination of the record discloses that the court gave eleven instructions, five at the request of plaintiff and six at defendant's request. Errors in giving instructions will be considered on appeal when all the instructions given are presented by the abstract. Roodhouse y. Christian, 158 Ill. 137; Briggs v. Page, 222 Ill. App. 223. However, we have considered all of the instructions in the record and although they are somewhat conflicting, yet upon a consideration of the entire record we are of opinion the verdict ought not to be disturbed.

the jury that before the plaintiff could recover he must prove (1) that he had acquired the rights of the lessors, and (2) that defendant made default in the payment of rent and the amount of default. By other instructions given at plaintiff's request the jury were told that under the issues in the case the defendant admitted that he became liable to pay rent in the sum of \$4500, but that he claimed he was discharged from liability in consideration of the payment by him of the thousand dollars and the transfer of furniture; that the defendant was required to prove such discharge by the prependerance or greater weight of evidence, and unless the jury were satisfied that such proof had been made, they must find the issues for the plaintiff. The court also instructed the jury at plaintiff's request that payment by the defendant to

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entitied to prove payments of rest under the general tasse."
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court improperly instructed the jury, and in the sets forth only the two instructions complained of, it fore not purport to only the two instructions complained of, it fore not purport to abstract all of the instructions. As era institution of the record abstract all of the instructions of the court gave elevan instruct that the stine request of plaintiff and air at defendent's request. Strees in giving instructions will be obtained on an entruction of them are presented by the airtical. Application in the Street Here's are presented by the airtical. Application in the record development, we have considered all of the instructions in the record and although they are somether and although they are somether and the first record we are of a later without the verdice value as considered at the or the verdice value as considered.

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plaintiff's real estate agents was not sufficient to discharge defendant from liability, but the jury must also find that there was an acceptance or ratification by the plaintiff to have defendant's obligation cancelled or discharged; that unless the jury believed from the evidence that plaintiff authorized or ratified such cancellation, then they should find for plaintiff.

\$1,000 to plaintiff's renting agents and delivered to them a bill of sale for certain furniture which was worth some \$2,500, in consideration of which they stated that defendant would be released from liability under his guarantee. This money was paid and the bill of sale executed in February, 1919. There was other evidence tending to show that before the payment was made and the bill of sale executed, the real estate agents stated they would take the matter up with plaintiff. The question was squarely put up to the jury as to whether the payment of the thousand dollars and the execution of the bill of sale were authorized by plaintiff, or the action of the real estate agents in this respect had been ratified by plaintiff.

We think the question was one of fact for the jury, and was so treated by both parties, and that the finding in favor of the defendant is not against the manifest weight of the evidence. Plaintiff offered no evidence, and upon a consideration of the entire record we are unable to say that the giving of the two instructions at the request of defendant prejudicially affected plaintiff. The case has been tried twice and we are of opinion that another trial would not bring about a different result.

The judgment of the Superior court of Cook county is affirmed.

McSurely, P. J., and Matchett, J., concur.

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HARRY KORSHAK, Defendant in Error,

VB.

LOUIS ASKER, Plaintiff in Error.

ERROR TO THE CERCUIT COURT

255 I.A. 632

MR. JUSTICE O'CORNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover \$3,000 claimed to be due under the terms of a contract entered into with the defendant. There was a verdict and judgment in plaintiff's favor for \$1,000 and the defendant appeals.

Plaintiff's declaration was in three counts. In the first it was alleged that plaintiff was engaged in the general contracting business of constructing, repairing and resodeling residential and business property and that he was employed by the defendant "as such general contractor, to supervise and construct" two spartment buildings for which plaintiff was to be paid ten per cent of the cost of the construction of the buildings, but in no event was plaintiff's compensation to be less than \$3,000 or more than \$5,000; that thereafter plaintiff employed an architect who prepared plans and specifications which were submitted to the defendant and approved by him; that plaintiff obtained estimates from various contractors of the cost of constructing the buildings: that defendant, in violation of the contract, after he had received the plans and estimates of the cost, awarded the work to another and refused to let plaintiff perform his contract: that the cest of the buildings would be \$30,000 and that under the contract plaintiff was entitled to ten per sent of this or \$3,000.

The second count was substantially the same except that it was alleged that under the custom prevailing and under the agreement plaintiff was entitled to receive ten per cent of the cost of the buildings. The breach of the contract by the defendant

MAILBROY Defendant in irror.

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The second count was right within the race trops a in, remains the march to the modern and reduce and becalls and it had cost of the rulidings. . "In trunc of to compare the terms of the feature" . was then alleged, and further that plaintiff was ready, able and willing to perform the services required of him but was prevented from doing so by the defendant awarding the contract to another party; that by reason of the breach of the contract by the defendant plaintiff was "deprived of the fair, usual and reasonable charges which he was rightly entitled to under and by virtue of said contract and custom." The third count was not materially different from the first.

An affidavit of claim was attached to the declaration in which it was set up that there was due and ewing from the defendant to the plaintiff, after allowing all deductions, set-offs and counter claims, "as and for services rendered as a general contractor, under and by virtue of an agreement entered into between the plaintiff and defendant \*\*." \$3,000.

The defendant filed a general issue and an affidavit of merits in which he denied liability and denied that he had employed plaintiff as general contractor to supervise the construction of the two buildings.

ber, 1925, plaintiff and defendant met, when defendant advised him that he owned two vacant lots and was desirous of constructing buildings on them; that an oral agreement was entered into between the parties whereby plaintiff was employed as a general contractor to obtain a survey and to prepare plans and specifications and obtain bids for the construction of two apartment buildings on the property; that plaintiff and defendant visited the property and thereafter plaintiff caused a survey to be made and an architect was employed to draw plans and specifications for the buildings; that the parties met frequently thereafter, going over the plans prepared by the architect; that the first set of plans was rejected because the Building Department of the City refused to

was then alleged, and further than you atto was rining to perfor the service recurred of him to was reposited from doing so by the left day than runing the contents to notion party; that by rearms of the track of the contract by the content plainties was "do alle or the four that the real rearms of the content plainties was relative or and for the time of and content and content of the time or and real relative said content and content. The third count race was relative the third count race was relative.

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approve them and the matter was taken to the Zoning Board of Appeals where the plans were again rejected. Afterwards other plans were prepared which were approved and plaintiff secured bids from a number of different contractors and they were submitted to the defendant; that the total cost of the two buildings, as shown by the bids submitted by the several contractors was \$30,000; that defendant took the plans and told the plaintiff to go shead with the work; that this was about the first of December; that a day or two thereafter the defendant, using the plans, obtained bids from other centractors whereby there was a saving of about \$4,000; that plaintiff was then notified that his services would be no longer needed, and the work was given to other parties who proceeded to construct the buildings.

There was no instruction given to the jury, nor was any requested by either party which enlightened the jury as to plaintiff's measure of damages. There is no evidence in the record. nor was any offered, tending to show the reasonable value of the services rendered by the plaintiff. But the theory of the plaintiff was and is that he was entitled to receive \$3,000, and although the jury returned a verdict for but \$1,000 it should not be disturbed because plaintiff did not receive all that he was entitled to. There is no count in the declaration, as defendant contends, based on the theory that plaintiff was entitled so recover on a quantum meruit, nor was there any evidence offered on this theory. It is obvious that plaintiff had not performed all of the services required by the contract. If he had done so he would have received. according to his own contention, \$3,000. Assuming, as we must, that plaintiff was wrongfully discharged by the defendant, plaintiff could not recover the contract price unless there was evidence tending to show that he had been damaged that amount by reason of the work he had done and by reason of the further fact that he had

apprave these and the matter was taked to ber coming Sourt of any peaks where the plane were approved end-standing where the plane shich care approved end-standing were amplituded to the endeaders; that the total does of the two builtings, as does to the the bide submitted by the several contractors has \$500,400; that the bide submitted by the several contractors has \$500,400; that the source of the allowing the standing that the plane end total the algorithm; the take and the contractors whereafter the defendance, well-near of thereafter the defendance, well-near plane, obtained byte from plane contractors wherefor there was a sevine of them to do the total that the test of the formality the services which he do the second the second to the second the second the second the the total the total the second to the second the total the total the second total these.

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been prevented from performing the work required of him. There being no basis in the declaration nor in the proof to warrant the judgment of \$1,000, the judgment must be reversed.

Since there must be a new trial, we think we ought to say that the contention of the defendant that the court erred in admitting blueprints and other documents in evidence over his objection is untenable. Plaintiff had a right to prove what he had done in the matter, and the evidence of blueprints was some evidence tending to show some of the services performed by the plaintiff. Complaint is also made of the giving of the 7th instruction on behalf of plaintiff. In view of what we have said in reference to the declaration, and lack of proof, and the theory on which plaintiff might recover, it is obvious that this instruction will not be given on a re-trial of the case. We are also of the opinion that the contention of the defendant, which seems to be that the verdict is against the manifest weight of the evidence, is unsound. On the contrary, we think the manifest weight of the evidence is that plaintiff was employed by the defendant, as he testified, and that he performed the services substantially as testified to by him.

For the reasons above stated the judgment of the Gircuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

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of three training as a list train of train of the oracle of parts aros sais test tenhooled sais to notice for eat test ver admitting blueprints and pilet december is evidence ever bis objestles is antenable. Plaintiff and a right to prove what he had dage in the mutter, and the evidence of bluegrints was some evidence tending to sacw neme of the agreese purformed by the plaintiff. Complaint is also made of the giving of the 7th tostruction an botalf of pigintiff. In rice of what we have said is reference to the decisration, and had at pronf. and the theory an which plaintiff pight "ecover, it is coving that this instruction will not be given on a re-triel of the case. To are also at the ogiaton that the contention of the defradant, which seems to be that the vertical to against the manifest scient of the evicence. is assound. On the contrary, to thise the manifest weight of the evidence is that plaintiff was employed by the deficient, as he testified, and that he performed the services succeedingly as testified to by him.

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For the resonn chers stated the judgment of the Utruit court of look county is carefuld and the court is resonded for a new trial.

THURSD AND EXPLANA

Moduraly, P. J., and hardness, J., censer.

PORTMAN TRUST & SAVINGS BALA. a Corporation, as Trustee. Appellee.

FRANK DERZIER.

Appellant.

of chicago, 255 I.A. 632

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff caused a judgment by confession to be entered in its favor for \$1,025 against the defendant. The judgment purported to be entered in accordance with the terms of a lease and the claim made was \$1,000 for rent for January, 1929, and \$25 attorney's fees. Afterwards, on motion of the defendant, supported by his affidavit, the judgment was opened up and he was given leave to defend. There was a jury trial and at the close of all the evidence the court, of its own motion, instructed the jury to return a verdict for plaintiff, which was accordingly done. Judgment was entered on the verdict and the defendant appeals.

The record discloses that on December 1, 1924, a written lease was entered into between the Lindlahr Sanitarium, Incorporated, a corporation, as landlord, and the defendant, Frank Demeter, as tenant. The lease covered property known as numbers 509 to 533 (both inclusive) South Ashland boulevard, Chicage, and was for a period of ten years from December 1, 1924, until November 30, 1934, at a rental of \$1,060 a month. In addition to the rent the tenant was required to pay taxes and all other charges levied or imposed upon the property. He was further required to insure the property in such companies as might be approved by the landlord, and the loss, if any, was payable to the landlord. The lease further provided that in case the property was destroyed or damaged by fire, the landlord should pay to the tenant, upon proper architect's cartificates, so much of the insurance money as might be required to repair or rebuild the

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Plaintiff to the followed to fulgreet by confession to be entered in its favor for \$1,025 against the defendant. The fulgreet purported to be untered to accordance with the terms of a lease and the claim ends was \$1,000 for rest for January, 1929, and \$1 attorney's fees. Afterwards, an motion of the defentiant, supported by his affidants, the just ment was evened up and as one given leave to defend. There was a jury trial and at the class of all the eventance the court, of its own metted and at the last the last a return a verdict for liaintiff, which was senortingly done. Just and was eatered on the vertice as the vertice of the court and the second of the court and case eaters on the vertice as the vertice.

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building; that if there were any surplus remaining, it should be paid by the landlord to the tenant.

The tenant entered into possession and made all the payments and performed all of the agreements as required by the lease. On November 16, 1925, the landlord assigned all of its interest in the lease to Otto Michael Rice, and Rice on December 36, 1926, assigned all his interest to Morris Goldman, and the latter on January 31, 1928, assigned all his interest in the lease to the plaintiff, the Foreman Trust and Savings Bank, as trustee, under Trust Ro. 3337.

The evidence shows that the premises were improved by nine buildings, but the nature or character of them does not appear; that on December 23rd a fire broke out and damaged three of the buildings so that they were untenantable, and on that day the defendant-tenant notified Arnold Marks, of Marks & Company, with whom he had all dealings with reference to the property, of the fire; that thereupon Marks once to the premises and saw what damage had been done; that the tenant then told Marks to have the buildings repaired, which Marks refused to do but requested defendant to make the repairs, which defendant refused to do; that thereupon the defendant told Marks he would vacate the premises and Marks replied. "Go ahead," and that, acting on this, the defendant vacated the premises on December 28, 1928, having paid his rent for December.

The evidence further shows that on February 25, 1926, the defendant-tenant and the then landlord, Rice, entered into a written agreement by which the original lease was modified so that the tenant would pay monthly to the landlord an amount sufficient to pay all taxes and insurance and other charges levied against the property, instead of the tenant paying the taxes, insurance and other charges annually and submitting receipted bills to the landlord; that in accordance with the modification, the tenant paid in

building; that if there were any surplus resaining, it should be paid by the landord to the tenant.

The tenant extend into presented and rade all the payments and preferred by the lease. On Morenber 16, 1918, the landlerd essigned all of its and tenest in the lease to Otto alonest Rice, and those on Denamber 10, 1928, assigned all his int that to Morris delicae, and the latter on January 31, 1840, assigned all his int that to Morris delicaes in the lass to the plaintiff, the Morenber 1840 and lawings lead, as it move, ander Trust to the last to the lass to the Plaintiff, the Morenber 1840 and lawings lead, as it move, ander Trust to the lawings lead, as it move, ander

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The evidence interest and the rect of the rect of the strain as the defendant-terms and the run land ord, and, and alter a militian errectest by raid. It is is it that it has even to third a last the tenunt relief as and translating to the court of the tenunt of tenunt of the tenunt of tenunt

addition to the rent of \$1,000 per month, \$308.34 monthly to Marks & Company, the landlord's agent, to cover such charges.

The evidence further shows that the defendant-tenant sublet the basement of the premises known as 511, 513 Ashland avenue, as he was apparently authorized to do, and that the subtenant vacated on February 5, 1929. Evidence was offered by the defendant tending to show that at the time of the fire he told the subtenant in the presence of Earks, the agent, that the subtenant must vacate unless he made other arrangements with Earks, but this evidence was ruled out.

The defendant contends that the judgment is void and should be reversed because the law does not authorize a judgment by confession for an uncertain or unliquidated amount, and that since the lease in the instant case provided that if the tenant did not pay all taxes and assessments levied against the property. including insurance premiums, these amounts should be considered additional rent for which judgment might be confessed; therefore the amount was uncertain and unliquidated and no judgment by confession could be entered. In support of this the case of Little v. Dyer, 138 Ill. 272, is relied upon. We think that case is not in point. The lease involved in that case contained provisions which were somewhat similar to the provisions in the lease before us, and judgment by confession was entered not only for the rent reserved but for taxes and other charges; and it was held that this could not be done because the amount was unliquidated. Afterwards, in the case of Fortune v. Bartolomei, 164 ill. 51. where a lease contained similar provisions, it was held that the judgment by confession might be entered for the rent specified in the lease which was certain and liquidated.

In the instant case judgment was confessed for \$1,000, being rent for the month of January. It is clear that the <u>Little</u>

addition to the rent of \$1,000 per south. To over such morrer.

The evidence further mass that the tyle inness

subjet the besenced of the overlace known as 311, 123 Asident arane, as he was apparently schorized to do, and that the sub-track recated on February 3, 1870. Orlience was offered by the defendant tending to show that at the time of the litte he told the whiteness in the presence of backs, the ag of, that the subsensat must vecate usions he rate ution arrangements with faring, but this evidence was rule, out,

The defendant or stends to are ful and the roll and should be reversed because the law near not but prize a justiment by confeccion for an alcertain or helication of antigim. I all to the bedivore ours inchest and al exect sof estile did not gry all lames and assessints leviled agricult the pro rev. including insuration of white continues to according to additional rest for which judgment hi he be quifread; therefore when it into it on both both chapting for nintering gay impose and Pession evalt be entered. In say, or a this test of a little To trink the Lit. 1972, is trilled upon. To trink the task to not and a least the same af valvet it that does confined the same and which were suc what siril r to the provisions in the reas being tant sit this lie ind har too as to too too ty fine ye fame ful bar , was THE THE CONTRACT THE TANK LINE CONTRACTOR TO LAKE SECTION OF THE TRACE SECTION OF THE CONTRACTOR OF TH . Les Ph. Ig. u ser industrials as unper auto to dem bibro aid Afterwards, in the case of farture v. Hortoke it, 164 and the induction by confession which he are set of the reat grant ind intended the states were stated and like incited.

 case does not apply but that the Fortune case is controlling here.

Under the terms of the lease the tenant deposited with the landlord \$2,000 as security for the performance of the terms and conditions of the lease, which further provided that "In the event that the lessee shall default or fail or refuse to perform the terms of this lease, the lessor shall thereupon have the right to terminate the same and retain the sum of Two Thousand and no/100 Dollars (\$2,000.00) and interest thereon as liquidated damages: and the argument of the defendant seems to be that since the landlord has retained this \$2,000, it must be presumed that this was retained so liquidated damages and that no further recovery can be had. It is obvious that this contention is unsound. By the provision of the lease, above quoted, it is clear that the right to terminate the lease and retain the \$2,000 was optional with the landlerd, and there is no evidence that it has exercised this eption, but on the contrary the fact that it is prosecuting this suit would indicate that it considered the lease to be still in force and effect.

modified, it was the duty of the landlord to repair the damages done by the fire out of the insurance; that since the property was not insured by the landlord, and since the landlord refused to repair the damages, and since the tenant advised the landlord that on account of three of the buildings being untenantable he would vacate and this was acquiesced in by the landlord and the tenant vacated, that the judgment is wrong and should be reversed. In reply to this contention, the only argument made by counsel for plaintiff is that the evidence fails to show that Earks, who, it was claimed, authorized the vacation of the premises, was the agent of the plaintiff in this respect; that the evidence shows that he was a mere renting agent and therefore not authorized to terminate the

ease does not apply but that the Westing case to controlling here.

Winder the terms of the Lone the terms derived with the landlore \$2,000 or security for the perference of the terms and conditions of the lease, which further previded that "is the event out mretrag of equipr to find to finale interest end design terms of this lease, the leasor shall thereupon have the right to teralized the same and retain the sun of Teo Thougand and no Angles ":sepasseb beiselupil as apered teeretit bas (w). Mu.kt) wished while the equie tail of of eases for relat to insure all has lard has retained this JS, 400, it must be presented tint this was mad gravesor testrul on sons for assent bestabling testing be had, it is obvious that this contented is uncound. By the or that the least the love order, it is deal and the the right eritate the lease and retain the \$3,000 was optional with the -on almi there is no evidence that it has exercised in a condition. tion, but on the contrary the fact that it is proceeding this suit would indicate that is considered the deade to be still in force and offect.

The defendent verteer and tends the carrier one lease, as soldified, it was the dary of the landhort to repair the inacted done by the fire out of the insurance; that since the property was not insured by the landerd, and whose the inadlord refused to repair the damages, and since the tenant advised to landlord refused to the pair the damages, and since the tenant advised to landlord and the following the indicates the residuant of the sealed on account of the mes assures to by the indicate were the tenant verse and chouly in resonant. In reply to this contention, the out, arguest the resonant. In plantiff is that the evidence fails to such took facts, as, a two claimed, authorized the recation of the creates, was are accepted the respect; that the evidence ances that he was a series plaintiff in this respect; that the evidence ances that he was a series resting agent and therefore not out orized to terminate the respect; that the evidence ances that he was a series resting agent and therefore not out orized to terminate the

lease.

We think the evidence in the record was not fully brought out and this resulted in part at least from the almost constant technical objections by counsel for plaintiff. Obviously, the plaintiff, being a corporation, must act through an agent. often, we think, court and counsel take a view that is entirely too technical when it is sought to adduce facts where the question of agency is involved. Roy Iverson Co. v. U. S. Lloyds, Inc., 251 Ill. App. 150; Meyer v. Iowa Mutual Liability Ins. Co., 240 Ill. App. 431; Pike v. Engler, 211 Ill. App. 520. We think there ought to be a retrial of this case where all of the facts should be fully brought out showing karks' connection with the property and his dealings with the defendant. Obviously, if it was the duty of the plaintiff to restore the three buildings so as to render them tenantable, and he failed to do so, this would warrant the tenant in vacating the premises. Gibbons v. Moefeld, 299 Ill. 455. But plaintiff contends that the premises were not vacated because the undisputed evidence is that the subtenant remained in possession of the premises during the month of January and up to February 5th. If the evidence disclosed that the subtenant was making ready to leave and did so with reasonable expedition, it might be that he was warranted in leaving on the 5th of February. Where the landlord breaches the terms and conditions of the lease which authorize the tenant to vacate, the latter is not required to do so at once but is entitled to a reasonable time. Kinn v. Slyde, 246 Ill. App. 26. And if the defendant-tenant was deprived of the use of three of the buildings by the wrong of the landlord, then no rent was due and payable for any of the premises although part was occupied by the tenant. Carlson v. Levinson, 228 Ill. App. 104.

We think the court erred in instructing a verdict in favor of the plaintiff because there was some evidence to the

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The think the evidence in the treered was too willy Transfered and north describe the state of the description of the second commissi technical abjections by counsel for ministiff. Obviously, the plaintiff, being a cor orriton, suct not through an agent. often, we think, there are coursel take a view that is until very too to not every sur state state enable of takes as it waste isolution! agency is involved, Nov lyercon for y. c. d. wley s. rac., "51 111. App. 190; Rever v. love intellightly larger, 24, 171. App. 431; Fire v. Romisz. 211 111. apr. 52. Te ..ish there per t to ce s thinger of a life of thous see. I thin to the next sees what to initiate out showing a natural constrained with the eroperty and it company With the defendent. Obviously, i't was the are the painted to remiera the three buildings to as is remar time tenseles, in as islied to lo so, take would carried the bench in a ceating the and Tilenia to Sud . For . Ill 982 , bartega. . v emodite . Sosias Tg In Just that our released besider jos etter evaluring end said which evidence is that the states and I washed in possessed of the real ext. of the first of the control of the contro leave and did so with reason le e paint al, at wind a till he - I administ the leaving on C little of the my. maling it was seen a but in recipitation base and a subsection base. ಕಾರ್ಯ ಕರ್ಮ ಕರ್ಮದ ಕರ್ಮದ ಕರ್ಮ ಕರ್ಮಕರ್ ಅವರ ಕರ್ಮ ಕರ್ಮಕರ ಅತ್ಯಕ್ಷಕ ಕರ್ಮಕರ ಅತ್ಯಕ್ಷಕ ಕರ್ಮ but in entitled to a reason of these year, the give, infill, a. . 25. And at the day on Suct-Con and Control ( Lot Control of Sont Control t the beliefungs of the wrong of the cartering for a contract the and payable for any or the countries in Alband 1810 in the formation Carleon v. sev nage, intill, h. 1 1. .inspol end

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effect that the lease was terminated by the oral agreement of the parties. On the retrial all of the facts can be adduced.

The judgment of the Nunicipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

effect that the lease was terminated by the oral agreement of the parties. On the retrial all of the facts out be nidueed.

The judgment of the Eunicipal court of Chicago is reversed and the cense is remanded for a new trial.

BEVEROED AND RESEASORD.

Moderaly, P. J., and Entenett, J., concur.



MATHAN SOLORON, Appellant

M. GARBER, Trading as

Appellee.

APPEAL PROM MUNICIPAL COURT

255 I.A. 6323

MR. JUSTICE O'CORNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$989.17 with interest from April 16, 1927. There was a verdict and judgment in defendant's favor and plaintiff appeals. The record discloses that plaintiff's place of business was located in Chicago where he was engaged in selling millinery. Defendant was engaged in the manufacture of millinery in New York City. An agreement was entered into between the parties whereby plaintiff agreed to sell goods for defendant upon which he was to receive a commission of 74 per cent. Plaintiff from time to time sold goods for the defendant and was paid the agreed commission. The basis of plaintiff's claim in the instant case, as stated by his counsel, is that "defendant promised plaintiff a commission of seven and onehalf per cent on all sales of millinery goods made direct by defendant, with or without plaintiff's solicitation or intervention. to certain parties residing or having their principal places of business in or about Chicago; " that the defendant had sold between June 20, 1925, and April 16, 1927, the following goods: Chicago Mail Order Company, \$10,000; United Millinery Company, \$189; Montgomery Ward & Company, \$3,000; total \$13,189, for which sales plaintiff had received no commission.

Plaintiff says that he did not make these sales but claims that under his oral agreement with defendant he was entitled to a commission of 7½ per cent. Defendant's position was that plaintiff was to receive commissions only on sales that he made

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THE ROLL BROWN PERCENT OF THE PRINT REPORT CLASSICA here have not the are the comment of sell for and lead of the court within the court of to deliver the court of the noted the contraction of the con and on re-orders that plaintiff's customers might send to the defendant.

At the conclusion of the evidence the court instructed the jury. He complaint is made that the instructions were not accurate, so we must assume that the question in dispute between the parties was properly submitted to the jury. They found the issues in favor of the defendant.

Two witnesses testified on behalf of plaintiff and considerable correspondence was introduced in evidence. The defendant read the depositions of three witnesses and certain documentary evidence introduced. Plaintiff contends that the court erred in overruling his objection to the depositions - that they had not been filed before they were read - and the further argument is made that they have never been filed.

The record discloses that defendant took the depositions of witnesses in New York City on February 15, 1929, and on March 20th the case went to trial. On the next day, when plaintiff closed his case and defendant offered to read the depositions, objection was made by counsel for plaintiff. It appears that after the depositions were taken in New York they were mailed to counsel for defendant instead of to the clerk of the Euniciaal court: that some two weeks or ten days before the trial the matter came up in court, when counsel for the defendant stated he would request a continuance so that he could return the denositions to the commissioner in New York, who would then send them to the clerk of the Municipal court. Counsel for plaintiff was given a copy of the depositions, but how long before the trial does not definitely appear. When objection was made to the reading of the depositions, counsel for defendant stated the foregoing facts az to the taking and returning of the depositions; that he did not send the depositions back because counsel for plaintiff stated some ten days before the actual trial he would not raise the

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point that they had been sent to counsel for defendant instead of to the clerk of the court. Continuing, counsel for defendant stated: "So I did not send them back to have them sent direct to the clerk. Counsel has had a copy of them. He said right in court before your Honor he was not going to raise any objection to their being sent to me rather than direct to the clerk."

Counsel for Plaintiff: "Yes, certainly, I did not raise that objection, but they ought to be filed in this case." Thereupon, counsel for defendant said he was filing them at that time, and an order was them entered of record permitting this to be done instanter. In view of the record we think it obvious that plaintiff's objection is entirely technical and without merit.

The depositions were read in evidence and the objection that the certificates of the commissioner who took the depositions were not read is entirely without merit. These matters should never be read to a jury. If there was any objection that the certificates were not in proper form, it should have been pointed out.

counsel for plaintiff further contends that the court should have directed a verdict in plaintiff's favor as requested, because plaintiff made out a prima facie case and no competent evidence was offered by defendant. Plaintiff testified that the oral agreement between the parties was entered into in New York City, therefore his claim depended upon an express contract. Plaintiff's testimony was to the effect that he was to be paid 7½ per cent on all goods sold by him and on all purchases made by mail order houses in Chicago where the goods were shipped by the defendant into Chicago. Witnesses for the defendant gave testimony to the effect that plaintiff was to receive a commission only on goods he sold and on re-orders given by plaintiff's customers, and that defendant refused to give plaintiff any exclusive territory.

We think that the terms of the contract entered into between the parties were properly for the jury and that the court

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did not err in refusing to direct a verdict in favor of plaintiff.

The judgment of the Municipal court is affirmed.

APPIRED.

MeSurely, P. J., and Matchett, J., concur.

did not err in refusing to direct a verdict in favor of plaints.
The judgment of the hunisipal court is affirmed.
APPENED.

MeSurely, P. J., and has thatt, J., consur.

33604

WILLIAM M. CAMPBELL,

Complainant,

YA.

CARL A. STARCK

Defendant.

PROPLE OF THE STATE OF ILLINOIS,
Appellee.

V 6 .

In Re CONTREPT OF CARL A. STRACK, Appellant.



MR. JUSTICE O'CORNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Carl A. Starck, the defendant, seeks to reverse an order of the Superior court of Cook county wherein he was adjudged to be in contempt of court for violating an injunction of that court. The court ordered that i'r such contempt the defendant be committed to the common jail of Sook county for a period of five days and pay a fine of \$750.

The record discloses that on October 23, 1923, a decree was entered restraining the defendant, Carl A. Starck, from practicing medicine or surgery and enjoining him from being connected with or operating a hospital within sixteen miles of the village of Palatine, Illinois, for a period of five years from June 29, 1926. This decree appears to have been approved by counsel for the conplainant in that suit and counsel for defendant. Afterwards, on December 18, 1928, the complainant in the suit, in whose favor the decree was entered, filed a petition in which it was alleged that the defendant had violated the injunctional decree and specific instances were set forth. The petition was verified. A rule was entered on the defendant to answer the petition and he filed his answer. The matter was referred to a master in chancery to take

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IN Re CONTEST OF CALL A. TIMON,

Committee Constant

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the proofs and make up his report with his conclusions. plainant appeared before the master and introduced considerable evidence. The defendant offered no defense. The master made up his report and made specific findings to the effect that the defendant had wilfully violated the terms of the injunction. Objections were filed, some of which were sustained and some overruled. Afterwards, on the coming in of the master's report, the defendant filed exceptions and on Earch 16th the court entered an order overruling the exceptions and approving the master's report wherein specific findings were made to the effect that the injunction had been violated by the defendant; and it was ordered that on account of such violation the defendant be committed to the common fail of Cook county for a period of sixty days. Three days afterwards the defendant moved to vacate the order adjudging him in contempt. Afterwards the court entered the order appealed from, which overruled the exceptions to the master's report and approved it and specific findings are made of facts showing the violation of the injunction by the defendant; in this order defendant was sentenced to five days in the common jail of Cook county and a fine of \$750 imposed. It is this order that the defendant seeks to reverse.

The defendant contends that "the complainant did not come into the trial court with clean hands," and he then attempts to point out some inconsistencies between the exhibit to the bill of complaint, which was the contract entered into between the complainant and the defendant in the chancery suit, and another exhibit which it is said is inconsistent with the first exhibit mentioned. The second exhibit describes certain properties as lot 4 and lot 8, and the argument is, as stated by counsel for defendant, "The mistake so obvious in the face of the record, in that lot four and lot eight not possibly lying alongside, it is sought by the defendant through the court's decree to confirm

. myleuland, ald ally trover ald queste bas alterta ada - Ming - those book this the nectaments are ted bornesses thentale evidence. The defendent aff wed no defense. The moster year is -ab wir this for the oil or againfull addocted maken bus stages wild fendant had will'ally wist ten the terms of the injunction. tions were filed, eams as rich terr samed in more arrests Afterwards, or the outilise in the life of seven as the following the "lied extentions and on cared little lies court on ered on arter over. ruling the executive and converge the sociar's separt as rits warelite fillings yore and to the d'est that the triunction had see the area by the defendant; and all were nicked that the company To another the lost the latent and be east it is in its lost for the terms and the company that the company is the company to the company that the company is the company to the company that the Cook county for a seried of staty till. Three days affect and the defendent naved to success the erder shifting of targets. There is a contract of the contract of the contract of the contract of the contract of ruled the executions to the context of the executions as reved it and epocitie finding after la or frote succiae the viet of the in proceeding by the commencent of the color section that the comment to fire inga in the colour paid to the court over the affine of "FEO imposed, it to hide when the terminant car are named to the growing

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the error and secure for himself an unfair and unlawful advantage, unsupported by any evidence. This argument is incoherent. If defendant had any complaint to make about the decree, he should have appealed from it. The record discloses that he not only had no complaint to make but that his counsel 0. K'd. it.

ocmplained of in the petition were not wilfully contemptuous. The substance of the contempt of which the defendant was found guilty was that he had practiced medicine after the decree restraining him from doing so was entered. The argument of counsel under this point is to the effect that the evidence taken before the master shows that there was no wilful violation of the injunction. Nowhere in the argument is any reference made to the abstract of record where the evidence complained of is pointed out. Obviously it is not the duty of this court to search through the record to see whether the argument is berne out by the record. However, we have considered the evidence in the record and are clear that the finding of the master, approved by the chancellor, is fully warranted by the evidence.

The defendant next contends that the sentence of the court "was contrary to the law and the evidence," and in support of this it is said that the defendant, being a physician, "stands. as one close to the homes and hearts of the community," and that it is therefore obvious that the imposition of the jail sentence and the fine of \$750 is unduly severe. This is all that is said in support of this contention. The record shows that the bill for injunction was filed January 17, 1927, and an February 1st an order was entered enjoining the defendant, pending the hearing, from practicing medicine or surgery or locating a hospital within sixteen miles of the village of Palatine. More than a year afterwards, on October 23, 1928, after the case was heard before the

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enjoining the defendant; and the evidence taken before the master and the report of the master and the finding in the decree are that the defendant had continually and wilfully violated both the preliminary and the final injunctional orders. The evidence shows that, and the finding is that the violation was willful.

Under these circumstances we think we would not be warranted in disturbing the order appealed from. The order of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

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33613

CENTRAL SCIENTIFIC COMPANY. a Corporation,

Appellant,

YS.

ROGERS PARK HOSPITAL, a Corporation,

Appellee.

APPEAL PROM MUMICIPAL COURT OF CHICAGO.

255 I.A. 632

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$932.73, being the balance of the purchase price claimed by plaintiff to be due for laboratory equipment and chemicals sold to the defendant. The case was tried before the court without a jury and at the conclusion of all the evidence there was a finding and judgment in the defendant's favor and plaintiff anpeals.

The record discloses that in December, 1927, Dr. Roman, who was connected with the defendant hespital, called at plaintiff's place of business and bought from it equipment and chemicals for a laboratory to be installed in the defendant's hospital at 69 20 North Clark street, Chicago. At that time Dr. Roman selected all of the equipment, which consisted of several articles, and they were shortly thereafter delivered to the hospital where they were installed and used until some time in May, 1928. The purchase price was about \$1150, and it was agreed between plaintiff and Dr. Roman that the hospital should give its eleven notes for \$100 each, maturing monthly, and the small balance was paid in each by Dr. Roman. In January, 1928, eleven notes were signed "Rogers Park Hospital by A. M. Roman" and delivered to plaintiff. In December, prior to the execution of the notes, the equipment was delivered to the hospital and there installed. In May, 1928, it appears that the hospital officials learned that Roman was not a doctor and he was severing his connection with

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CERTRAL SCILLTIME COLPASY, a Corporation.

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ROSERS PARK HOSFYTAL, B. Corporation.

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OF CHICAGO.

ER. JUSTICE O'CORECT DELIVERED THE OFINIOM OF THE CURRY.

Plaintiff brought suit against the defendant to receive \$932.73, being the belance of the surcture frice civing dependent to be due for laboratory againment and charles a sold to the defendant. The case was tried here at the ocurt without a jury and at the enactueion of all the evite of there was a finding and judgment in the rejectant's favor and element in the rejectant's favor and element appeals.

ing record dischass that the December, 1937, ir. Amma, who was commeted with the defeniable meet al, cuit to at has improlupe if wor't inques has resulted to early at little la structured out at beignied of yrothreds a rel also hands hospital as 5070 borth wants etroit, Chargo. At that the m. found selected all of the sunjament, which consists of versel artichen, and they were abortly there after britgered to the all this sace little term but bulledent exem vold area Eaglered May, 1998. The ourgnass price was shout fills, and it was spread wat avt "lugge Legimen and she to be Tillalate managed and averaged ಇಂದರ್ ಕ್ರಮ ಸಂಚರ್ಚಿಕ ಸ್ಥಾರ್ ಅಗಳು ಮತ್ತುಗಳು ಮುಸ್ತಿಕ್ಕಾಗಿ ಸಾರ್ವಿಕ ಕ್ರಮ ಸಂಚರ್ಚಿಕ ಸ್ಥಾರ್ಗ was paid in case by Mr. Money. In Just My, 1981, John Schoten were algoed "togers dure hear that by h. . . . . comen" one indivotes to plaintiff. in Dogmber, orior to the execution of the notes, at "will and areas to. In it and was as foreviled any subsequen send learned alulation and incode and the trace of the water Roman was not a coeter and he was never as als comments it.

the hospital, and at that time the defendant refused to pay for the laboratory equipment on the ground that it was not purchased by the hospital but by Dr. Roman individually. Thereafter the instant suit was brought, not upon the notes but upon the open account, with the result as above stated.

Plaintiff contends that the judgment is wrong and should be reversed because at the time of the purchase and sale of the laboratory equipment it dealt with Dr. Roman as a representative of the hespital; that it afterwards delivered the equipment to the hospital where it was installed and used; that it billed the hospital for the equipment and received no complaint from the defendant, and therefore the defendant is estopped to deny that the sale was made to it.

On the other hand, the defendant's position is that all of the evidence shows that Dr. Roman was not authorized by it to make the purchase, and that he bought it for himself; that plaintiff, in dealing with Dr. Roman on the theory that he was the agent of the hospital, did so at its peril under the well established principle of law that it was the duty of plaintiff, before extending credit, to ascertain Roman's authority, if any, and not having done so, and the purchase having been made by Roman for himself, the judgment should be affirmed.

The evidence is to the effect that in December, 1927, Dr. Reman called at plaintiff's place of business with a view to purchasing laboratory equipment and chemicals to be installed in the Regers Park Hospital, a seven story building which had been recently completed, with a capacity of 116 beds, and which was then being conducted as a hospital; that Dr. Roman stated that he was a brother-in-law of Dr. Eackler, the president of the defendant corporation; that at that time it was explained to Dr. Reman that where such equipment was bought by a hospital or simi-

the hospitel, and at that time the defendant refused to pay for the laboratory equipment on the dressed that it are not and that it are not and the the by the hospitely. Theresiter the immeant suft was bround, not upon the neses but upon the open account, with the result as shown atsed.

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lar institution, there would be a discount of ten per cent, while if purchased by an individual there would be no discount. Dr. Roman stated the hospital was owned by the family - that he and Dr. Mackler owned the hospital, which was not incorporated, and that he was authorised to buy the equipment for the hospital. various articles of equipment were selected and afterwards the financial standing of Dr. Roman, and probably the Rogers Park Hospital, was investigated by the plaintiff, inquiries made of the Dun Hercantile Agency and a bank, with the result that a favorable resort was obtained by plaintiff. Afterwards the equipment was sent out to the hospital and there delivered, most of it being receipted for by Dr. Roman, who was in charge of the laboratory then being installed. Some of the equipment was sent to the hospital by automobile, some by parcel post and all of it was billed to the Rogers Park Hospital, the defendant. The evidence also shows that the equipment was installed and the laboratory operated by Dr. Reman in connection with the hospital, and that bills were sent by plaintiff to the defendant hospital in reference to the transaction and that defendant's officials knew of this fact but made no complaint to plaintiff or to any one else so far as the record discloses. There was some evidence that Dr. Roman conducted the laboratory in his own behalf and made charges to the hespital for services rendered by him, but the evidence is rather meager. However, there is no intimation that plaintiff had any notice or knowledge of any arrangement between the hospital and Dr. Roman in regard to the laboratory. There is other evidence in the record, which we think unnecessary to advert to here, all indicating that the defendant hospital knew that plaintiff understood that it was dealing with the hospital and not with Dr. Reman individually.

lar institution, there would be a discours of but out out, while if purchased by an individual there would be no discount. Ir. home of the it will the breed tal were given by the land of the tall Tr. Andilar owner too hospital, which was not incarrotated, and the was notherized to buy has equipment to the hopeing. various articles of socionous were seisched aut afterwards the Phanetal standing of in, man, out eroboly our Reger Port Money tal, was investigated by the plaintiff, lacestice made of and the her out the agency and a bank, whin the reach think and ent abravanth. This also ve boulates any the or eldatoval degree to be stored the contract of the townstance of the store delivered, and our to make the since of the one of the was the charge of the as then are increased to med the first animal was and the second was and the the hospital by sucception, some by parami past of its reas billed to the appare for a patent, the document. The avidence grounded and the telephone was alleging two and that the walls asked sperated by Ar. welled it comported the lie to he milled. A the bills were sent by plaintiff to the defended hospital in refer To we transaction and that dofondant to office and a good mole the grap or to Tilliain of this company on man fur last ald ed for as the record discloses. There was some outdoned that ir. demon conclusion the leverthing it its conclision that have energies to the heapital for services readered by him, but the drident to Towever, there is no irthurded that electriff had TO MOON TON MY two Likit of out assert thems were you to the west to so tone you ir. Remain in require to the inderensy. "here is the release evidence in -ul lie ented out the waterways and respect to here to be added to for the first with the defence of the first know this to be the first of the - Hi day of the office for both find the two one is a writing one of recip ALLEMENT PRESERVE

In these circumstances we think the defendant ought not new to be heard to say that the equipment and chemicals were purchased by Dr. Reman individually and that it cannot be held liable.

1 Mechem on Agency (2nd ed.), secs. 245, 246; Thurber & Co. v.

Anderson, 88 Ill. 167; Faber-Musser Co. v. DecClay Co., 291 Ill.

240. In the Anderson case suit was brought for a bill of goods shipped by the plaintiff to the defendant's address on an order given by the defendant's son. The son received the goods and made use of them himself without the knowledge of the father and the father was held liable. The father denied that the son had any authority to purchase the goods and further denied that the son had purchased the goods, but the court said: "but it does not appear that appellant (plaintiff) had any reason to suspect that the goods were not ordered by him. (the father.)"

The judgment of the Municipal court of Chicago is reversed with a finding of fact, but since there was no jury and the overwhelming weight of the evidence shows that defendant is liable, the cause will not be remanded but judgment will be entered in this court in favor of plaintiff and against defendant for \$932.73.

JUDGMENT REVERSED WITH A FINDING OF FACT AND JUDGMENT MATERED IN THIS COURT.

McSurely, P. J., and Matchett, J., concur.

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DEFENSY & CC., a Corporation.

Appeal Properties of Michigan Central Railroad Company, a Corporation.

Appeal Properties of Michigan Central Railroad Company, a Corporation.

Appeal Properties of Appeal Properties of Michigan Central Railroad Company, a Corporation.

Appeal Properties of T. A. 633

MR. JUSTICE O CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to receiver \$404.50 claimed to be damages it had sustained by reason of the failure of the defendant to deliver two cars of cucumbers on the 12th street team track, at Detroit, Michigan, within the reasonable and customary time. The case was tried before the court without a jury and there was a finding and judgment in defendant's favor and plaintiff appeals.

were transported from Alabama to Detroit, placed upon defendant's Dock team track, and plaintiff notified of the arrival of the cucumbers; that two days later the defendant placed the two cars upon its 12th street team track in Detroit, where the outsimbers were received by plaintiff. It was stipulated that during the two days time the market for cucumbers dropped so that the value of them was \$404.50 less than if there had not been the two days delay.

The bills of lading under which the two cars moved previded that the defendant railroad should carry the encumbers to
Detroit "to its usual place of delivery," and plaintiff's position
was and is that the usual place of delivery was on the 12th street
track and not on the dock team track; while the position of the defendant is that the usual place of delivery, as mentioned in the
bills of lading, meant either of the two tracks. This was the sole
question in the case.

MINEY & CE., a Perporation,

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MICHIGAN GESTMAL RAILHOAD COMPANY, a COTHOTELLON, Appellon,

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255 I.A. 633

ar. Justics o'comech beliverin the opinion of the coupy.

Plaintiff brought suit against the defendant to recover \$404.50 claimed to be decaper it had unstained by reason of
the failure of the defendant to deliver two cars of sugurbers enthe 18th street tem track, at Detroit, Blougen, within the
resumable and customary time. The same was wrise before the
court without a jury as dinore was a thruin, and jud tent to desfendant's favor and plaintiff appears.

The record disclose that the cariods of successful and transported from Alabama to Detrit, placed upon defection?

Dock team trans, and cinistiff notified of the affival of the curbers; that two days later the defendant, dadd the two care upon its 18th sirect transtrate in letters, where is eventhers were received by plaintiff. It was all middle that that the value two days time the market for queumbers drophed on that the value of than was Save. At less than the the days.

The bills of lading which has two core beyond prowided that the laisectat railroad etchéd corry the excentera to Detect to the usual place of delivery," and an existive partition was and is the treat place of delivery was an earlier street track and not on the dear team track; "and a tar position of the "efendent is that the usual place of desivery, as continued to the bills of lading, meant either of the tracks. This was the sale question in the case. The undisputed evidence also is that it was but about two blocks from the place where the cars were placed on the Dock team track to the place where they were two days later delivered on the 12th street track. Two witnesses who lived in Chicago gave testimony to the effect that the usual place of delivering produce such as the cucumbers in question, in Detroit, by the defendant railroad was at the 12th street Team track. But a careful reading of the testimony of these two witnesses discloses the fact that they had little information on the subject and their testimony is unsatisfactory. A witness for the defendant who lived in Detroit and who had been an adjuster and special investigator for the Chaim department of the defendant railroad at Detroit for a number of years, testified that the usual place for delivery of such produce was at either of the two years, and that about the same number of cars were delivered at each track.

The court in deciding the case gave more credence to the testimony of the latter witness than he did to the two who testified on behalf of the plaintiff, for the reason that the witness from Detroit had much more information and was far more familiar with the true state of facts. And upon a careful consideration of the evidence in the record, we are in entire accord with the finding of the trial court. Furthermore, we are of the opinion that the plaintiff ought not to recover in this case because the facts, as stipulated, show that upon the arrival of the two cars in Detroit they were placed on the Dock team track and plaintiff immediately notified, and there is no evidence in the record - although there was some talk by counsel - as to why the cucumbers were not accepted on that track. Two days later the Railroad company moved the cars to the 12th street track, which was but two blocks distant, and the evidence shows without dispute that one track was as accessible as the other and that about half of the care of produce coming into Detroit over the defendant

treds tud egw it totil of outs complye betugathen adl the Blocks then the place where the cars were placed on the Book team track to the place where they were two later the confidence on the lath atreet track. The witnesses one lived in 'nicago maye sessimeny to the elicat that the usual place of delivering produces such as the encumbers in constion, in Petroit, by the defendant railroad was at the 1 th street leas trees. But a carreful recen ing the transfer terminal learners of the property of that they had little information of the notices that their test. meny is unsatisfactory. A witness for the lateral and lived in To't Talentinevo/ Lelvece has receitad on most had one tip tip a net thorset to becalies trobucted ont to terminage minit odt To viewilsh tel spain issue the thirly the term of your tell state as a second such produce was at either of the two yords, and thus shout the singles of come were delivered at recip tracks.

The court in spublic, the over weve more or whence to the testimeny of the latter without than he dit to the two who water and rest on being the wind of the reason being we being Bees from Betroit that more fortal formal started more than familiar with the true state of fints. And Jose a sarsial comelderation of the swidenin in the report, we are in eaters encored with the finding of the trial sourt. Forthersore, we are of the wed ware alad his reveces out to trave I that the edition in indicate esses the facts, as a significat, some when the rrival co the two care in lett. It they were placed of the liver t. ... thous and on the late the other periods of the first of the company of t The record - to there was take by a countries to - broom the the excustors were not accepted on that tro. I'm dain large the the fire a second and the case of the case with a case a second before was but two blocks Atalent, sad the salisace above sitient disoute Blue leads lest has weste and as elelanouse to the Moard and issis the eare of profits coming into Detroit ever the defendant

railroad were placed upon either of the two tracks.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

MeSurely, P. J., and Matchett, J., concur.

railroad were placed upon cither of the tro tracks.

ai case to true of the Euniciael court of Chicago is settlined.

ASSETSHED.

Wednesdy, P. J., and hatchest, J., concur.

S3661
CATY OF CHICAGO,
Appgalee,
Va.

in the House of Correction.

APPEAL FROM MUNICIPAL COURT

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633

Appellant.

The City of Cuicago, by leave of court, filed a quasithat
eriminal complaint against L. L. Boule, charging Boule "did then
and there conduct, operate and carry on ins. broker without having
obtained a license so to do in vicintion of Sec. 394 of the Chicago
Municipal Code of 1922." A jury was vaived and the cause submitted
to the court who, after hearing the evidence, found the defendant
guilty as charged and a fine of \$25.00 was imposed. The defendant,

MR. JUSTICE O'COREGE DELIVERED THE OPINION OF THE COURT.

Section 384 of the Municipal Code of Chicago 1922, of the violation of which the defendant was convicted, is as follows:

having failed to pay the line, it was ordered that he be confined

"384. Insurance Broker.) An insurance broker shall include all natural persons whether so engaged in their individual capacity, or as a member of a firm, association or corporation, engaged for owners or others to be assured in negotiating contracts for insurance on lives, buildings, vessels or other property, including workmen's compensation, personal accident and disability, plate glass, automobile and all forms of ensualty insurance and fidelity and surety bonds, either directly or through any other broker, or through an insurance agent, or with any insurance company."

The implication in the briefs and arguments filed in this court is that the court found the defendant muilty of acting as an insurance broker without having paid the license fee to the City of Chicago and obtaining a license card. A great deal of argument is indulged in by counsel for both sides as to whether defendant was acting as an insurance broker within the meaning of the City ordinance; but it is obvious that all of this argument is inapt because before the conviction of the defendant could be sustained a charge must be made against him, and there is no charge

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made against him in the complaint filed. The complaint charges the defendant with the vicinties of section 384 of the Eunicipal Code above quoted, but that section attempts only to define an insurance broker. Obviously the work he did in connection with the insurance business did not violate section 384 because there is nothing in that section which one can violate.

The judgment of the Eunicipal court of Chicago is ra-

REVERSED AND REMANDED.

Medurely, P. J., and Matchett, J., concur.

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33476

AVBER FURETTURE COMPANY.

Corporation,

Appellee.

HERMAN LANK, EMIL LANK and BEN LAND.

Appellants.

APPEAL PROM SUPERIOR COURT

OF COOK COURTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse a decree entered by the Superior court of Cook county, reforming a lease and enjoining the defendants from attempting to collect a judgment entered in their favor against the complainant in the Municipal court of Chicago and further enjoining defendants from seeking to enforce any claim against the complainant for the use and occupation of a barn or garage located in the rear of 1646 West Chicago avenue.

The record discloses that on April 20, 1912, the owner of the premises known as 1646 to 1652 West Chicago avenue, inclusive, entered into a written lease with the complainant. The lease covered a period of ten years with an option to extend it to five years. The premises at 1646 were improved by a three-story building with a garage or barn in the rear; immediately adjoining this building on the west the property was vacant. The lease provided that the owner would construct a building on the vacant property. This building, together with the barn in the rear of 1646 West Chicago avenue, were covered by the lease. The building was constructed and complainant went into possession about August 1, 1912, and paid rent to the landlord during the entire period covered by the lease.

In 1923 the del'endants purchased the property known as 1646 West Chicago avenue, and it was stipulated on the hearing that a witness for the complainant would testify that no demand was made

TURESTURB CO. PARY. derpuretion,

Appellee.

bus Maal Mills ART LABORS. BEES LANKER.

App allentu.

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By this recent the description when to reverse a descre entered by the Superior court of Cook county, referring a lease and ons single the defendants were antiquesta and pulling the collect a judgment of tores in their favor against the completement in the Manielpel court or chieses and justines mericandanish galulatet confirm to ansein. eny claim signings the complainant for the sea sea occupation of a barn or gorage lacated in the reer of 1646 West Olicage evenue.

The renors disclosed that we harit 50, 1917, the exper of the premises known as lost to 1655 heer whiteen avenue, inclusays, outered into a written longs with the confidence. The lease covered a pariod of two years with an ention to extend it to five years. The premises at lose were increved by a runsereby building with a garage or born in the rear; immediately adjoining tries bulleling of the mast the property was vacable. The lease provided extract to success and the constant a constant of the second of the Tale bullding, together wit due bern in the rear of leaf week Chicago avenue, were e-vered by the Leade. The little wie red to the structed and complaint while it to possessining about the party of the and paid rank to the landlines diveled the entire neston coursel by the lange.

we makers Agandada, only positionaric equipolates and 2087 th less west unitable actual and it was enloudabled on the actual that w seas now has not on inth gridner bluor troop. Irono and not unearly by the defendants on the complainant for any rent or for any compensation for the use or occupation of the barn in the rear of 1646, and there is no evidence to the contrary. Counsel for the defendants stated on the trial that defendants had repeatedly claimed compensation of complainant for the use and occupation of the garage, but no evidence was offered on this pointby the defendants.

ses as 1648, 1650 and 1652 West Chicago avenue; and the evidence shows that the property in the rear of which the barn or garage was located was known as 1646 West Chicago avenue. The bill alleged, and the evidence proves, that there was a mutual mistake in drafting the lease, that it should have described the barn or garage as being in the rear of 1646 West Chicago avenue, and there is no evidence to the contrary, nor is there any argument that this is not the fact. The evidence further shows without dispute that the complainant paid to the landlord the rent for the premises covered by the lease; and obviously if the defendants were entitled to claim compensation for the use and occupation of the garage or barn, complainant would be compelled to pay twice for this property.

The entire argument of the defendants in this court is not more than one-half page. The point argued is that "Courts will take judicial notice of matters of common knowledge," and the argument seems to be that complainant should have known that the garage was located in the rear of 1646 West Chicago avenue. The undisputed evidence, however, is that the landlord and the complainant-tenant made a mistake in the written loase and there is no evidence to the contrary nor is there any argument that the evidence does not sustain the decree. There is no merit in this appeal. A clear mutual mistake having been proven in the written lease, equity will decree its reformation as was done in the instant case, and the barn or

by the defendants on the count thank for ony neat or for any composition for the use occupation of the hare in the rear of the hare in the rear of the contrary. Council for the defendants stated on the trial that defendants had represently claimed compensation of complicitant for the use and recupation of the garage, but no swidence was offered an this notably the fertants.

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garage having been leased to the complainant, who paid the rent therefor in full, the defendants are in no position to interpose any defense. When they purchased the property in 1923 the garage or barn was in open possession of the complainant and so far as the record before us shows, no demand was made on the complainant to pay compensation until suit was brought in the Municipal court in Fenruary, 1927.

The decree of the Superior Court of Cook County is affirmed.

AFFIREED.

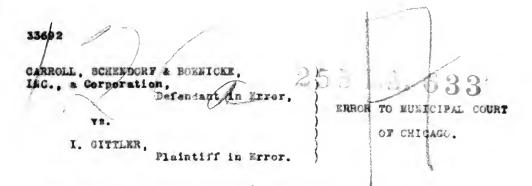
McSurely, P. J., and Matchett, J., concur.

garage having hear leased to the complainant, who paid the rest therefor in full, the defendance are in no position to interpose any defense. When they purchased the property in 1923 the garage or barn was in open passession of the complainant and so far as the record before us shown no demand was made on the complainant to pay compression until suit was brought in the auniolpal court in February, 1987.

The degree of the Superior court of cook Courty is affirment.

APPIRITED.

Meduraly, P. J., and hatchett, J., concir.



MR. JUSTICE O'CORNOR DELIVERED THE OPICION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$205.11 claimed to be due it as real estate broker's commissions for the unexpired terms of leases obtained by it for the defendant. There was a trial without a jury and a finding and judgment in plaintiff's favor for \$200.

The record discloses that on April 20, 1928, plaintiff and defendant entered into a written agreement from which it appears that the defendant was the owner of the apartment building known as number 4650 to 4656 Woodlawn avenue, Chicago, consisting of sixteen flats or apartments; that plaintiff was appointed defendant's exclusive agent for the care, management, leasing and collecting rents from the premises from "April 20, 1928, until I sell the building." Plaintiff was to receive in payment of its services, three per cent on all rents collected and was to make monthly reports to defendant. The contract also contained the following paragraph: "In case of withdrawal of management, I will pay Carroll, Schendorf & Boenicke, Inc., the regular Chicago Real Estate Board commission on the unexpired term of new or renewed leases which have been drawn by Carroll, Schendorf & Boenicke, Inc."

It was stipulated that on hovember 1, 1928, the defendant sold the property and that the tenants of the building had entered into leases, through plaintiff's efforts, which had not at that time expired. Plaintiff claimed commissions of three per cent of the amount of the rent reserved by the leases, which was

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the regular Chicago Real Estate Board rate of commission. It was further stipulated that plaintiff's statement of claim "correctly states the amount of the Chicago Real Estate Board's Commission on said unexpired leases, to-wit: two hundred and five dollars, and eleven cents (\$205.11), and prior to the sale of the building by the defendant, and that the defendant withdrew the management of said building from the plaintiff."

The defendant's contention is that plaintiff was entitled to no commission after the sale of the building, which was Movember lat, and that since all of plaintiff's claim is for the commissions due on the unexpired term of the leases after Accember lat, plaintiff was entitled to no judgment; that the written agreement entered into between plaintiff and defendant April 20th, above mentioned, meant that the plaintiff would be entitled to commissions for the unexpired terms of the leases only in case the defendant voluntarily withdrew the building from the plaintiff, and that since the withdrawal was not voluntary but by virtue of the sale. the judgment is wrong. Whatever might be the proper construction to be placed upon the provision of the last paragraph of the contract above quoted, in case the withdrawal was brought about solely on account of the sale of the property by defendant, we do not pass upon because the stipulation entered into by the parties on the trial is that the building was withdrawn by the defendant prior to the sale. This being the fact, defendant's contention is untenable and the judgment of the Eunicipal court of Chicago is affirmed.

APPIREED.

McSurely, P. J., and Estehett, J., concur.

the regular Chicago desi "ste's board rate of portliton, it wis further estimated that of intiff's subsent is claim "correctly states the count of the Chicago desi setate nearly desistance on east unempired tosses, to its two hardred and two for era, and aloven courts (\$2.5.11), and clow to the sale of the best ing by the defendent, and that the jetonical and another the Lindsent of the halleing from the plaints int. Andrew the Lindsent of the maid building from the plaints if."

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MaCurely, F. J., and watchess, J., Januar.

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THE MEMCHAETS AND MANUFACTURERS SECURITIES COMPANY, a Corporation, Appellant,

VB.

GNORGE W. FORD, MARIE S. FORD, ROSWELL N. JONES, DAISY I. JONES, et al., said Roswell N. Jones and Daisy I. Jones being Appellees. APPEAL PROM SUPERIOR COURT

ON COOK COUNTY.

MR. JUSTICE O'CORNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the complainant seeks to reverse a deeree of the Superior court of Gook county sustaining a general and special desurrer of certain defendants and dismissing the bill for want of equity. The question for decision is, does the amended bill state a cause of action.

The bill was one which sought to foreclose a mechanic's lien on certain property on account of the non-payment for a garage constructed by the complainant. It alleged that complainant was the owner of a written contract entered into between the contractor who constructed the garage and two of the defendants who were alleged to be tenants of two other defendants who were the owners of the property, and that the owners of the premises knowingly permitted the work to be done. Other lien holders were made parties defendant. The bill alleged that a contract for the construction of the garage was entered into July 14, 1927; that the contractor constructed the garage, which was accepted; that certain payments were made, leaving a balance/of \$201.80; that on August 2, 1927. the centract was assigned by the contractor to the complainant; that the last work was done on August 2, 1927; that claim for lien was filed in the elerk's office of the Circuit court of Cook county on August 11, 1927; that the claim for lien gave the date of the contract, when the work was completed, the amount due, and a sufficiently correct description of the real estate.

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Shinds W. Mar. Baall S. Mall. R YFELL A. JONNS, DALLY I. Tones, et al., said heavell a. Jones and Daley I. Jess being Appectage.

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IR. TUBLICK C'CORROR INTIVERVE THE COTATOR OF THE CORRT.

By this appear the compiliance seasons in the coverse a dewhere it is superior court of Cose county and thing a general and special descript of certain definitudes and therefore the this for wast of equivy. The presides for decision is, in a submitted bill state a case of action.

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The defendant contends, as we understand his argument, that certain exhibits were attached to the original bill and also to the supplemental bill, and that there is a variance between some of these exhibits and the allegations of the bill; that the bill alleges that the contract was entered into by John Telger, doing business as the Acme Construction Company, while the contract attached as an exhibit to the amended bill shows the contractor to be the Acme Construction Company; certain other variances are pointed out between the exhibits and the allegations of the bill.

On the other hand, complainant contends that there is no such variance and points to a copy of the contract which was attached as Exhibit A of the original bill, in which the contractor is named as John Telger, doing business as the Acme Construction Company. We think that none of these contentions are before us because an examination of the amended bill discloses the fact that no such exhibits were alleged to be attached to the amended bill except "Exhibit A" which is a copy of the account sucd upon, showing the total amount of the contract to be \$231.80 and a payment of \$30, leaving a balance due of \$201.80.

We think the notice of the claim for lien filed with the clerk of the Circuit court was in compliance with section 7 of the Eschanics' Lien Act. We are also of the opinion that the petition substantially stated all that the statute required. In this view we think the court erred in sustaining the desurrer to the amended bill.

It follows, therefore, that the decree of the Superior court of Cook county is reversed and the cause remanded for such further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

The defendant doptende, as we understood his ergument, that certain sublits were attached to the original bill and also to the supplemental bill, and that there is a verience between some of the supplemental bill, and that there is a verience between some of these shifts and the allegations of the bill; that the bill alleges that the centract was entered into by John Telger, doing business as the same transfer washed to the same the centractor to take the same Construction Company; certain about variances are pointed out between the exhibits and the allegations of the bill.

On the other hand, complained that there is sentract which was said reries and points to a copy of the contract which was attached no Exhibit a of the original cit, in which the contractor is made as included as John Folger, doing trainers as the acus Construction Company. We think that none of these controlions are before us because an exection of the massissiful that none of these controlions are the fact that account cits fact that account cits fact that account cits canded bill account cits account of the account of the social country abouting a total account of the contract to be \$251.00 and a parent of 1850.

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Medurely, I. J., and haranett, J., conaux.

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CHICAGO VITREGUS ENAMEL MODUGT

VS.

GERMER STOVE CO., a Corporation.
Appellant.

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OF SERICAGO.

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

and delivered to defendant. Defendant did not deny the deliveries nor liability but filed a plea of set-off, claiming that the merchandise in controversy was of a poor quality which when used resulted in loss of profits and in damages. The case was tried before the court and jury, but at the conclusion of the evidence the court directed a verdict for plaintiff. Judgment was entered thereon for \$10,678.65, from which defendant appeals.

This controversy arises over the commodity called frit, which is a glass product used as the basis of enabelware. Frit is made by running melted glass into water and then breaking it up into small pieces about the size of a pea. It is then put through various processes of grinding and mixing with water and other ingredients to the consistency of a thin paint which is sprayed by air pressure upon the material to be enameled, which is then baked. The frit was shipped while in the pea state, when it is impossible by inspecting it to determine whether or not it is defective or of a poor quality. This can be determined only by the results of the enameling.

Shipments of the frit in question commenced in January 1927, and continued at various times until the following September inclusive. Shortly after the shipments in January defendant made complaint about the results of enameling and many conferences and

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CHARLE STOVE CO., & Coloration,

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communications were had in an attempt to locate the cause of the trouble, which seemed to be somewhat obscure. Defendant kept all of the shipments.

Defendant argues that (1) the frit was sold under an implied warranty that the goods were reasonably fit for the purposes of producing enamel, that the seller knew it was ordered for this particular purpose, and that the buyer relied upon the seller's skill or judgment. Section 15, paragraphs 1 and 2 of the Sales act; (2) that the question as to whether the unsatisfactory enameling was caused by an inferior quality of frit, as claimed by defendant, or caused by improper factory conditions, as testified to by plaintiff's witnesses, was for the jury to determine; (3) that defendant could keep the goods and claim a set-off against the seller for damages for breach of warranty. Section 69, Sales Act.

Even if it be assumed that all of these points are sound, it would not avail the lefendant upon this record, for the reason that there is no evidence upon which the fury could fix the amount of damages suffered by defendant. It is said that the court improperly excluded the deposition of Mr. Knoblock whose testimony would have proven the amount of damages. Even if this had been admitted it would have failed to give any definite basis for fixing damages. Enoblech testified that his company, the Eric Metal Furniture Company, had an agreement with the defendant company in June, 1927, to deliver a certain number of gnameled door backs and that there were some defects in the enamel of some of them and these were rejected. When asked as to the percentage of rejections, he replied, "I would not be able to state that defimitely:" that to the best of his recollection they would be as high as 75 per cent "on some days." Such testimony would only call upon the fury to guess as to the amount of damages. All of the testimony relevant to damages was nebulous and uncertain.

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To maintain a claim of set-off defendant must prove the itemsof damages with the same particularity and definiteness as if he were the plaintiff in a case seeking to recover damages, and where there is no evidence on which to predicate a verdict for a certain amount, it is proper for the court peremptorily to instruct the jury.

warious questions raised in the respective briefs of counsel, but for the sole reason indicated above we hold that the trial court was justified in instructing for the plaintiff.

AFFIRMED.

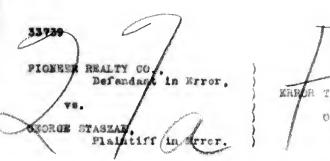
Matchett and O'Connor, JJ., concur.

To maintain a claim of ret-off defendant samet prove the itemsof damages with the asset of pertinuity and definited ness as if he were the plaintiff to a core caring to recover damages, and where the nessence of which to prediction a certain angunt, it is proper tor the court personant amount, it is proper tor the damage.

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but for the soile resea indicated cove we hold that the trial
ocurt was justified in instruction for the plaintiff.
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MAROR TO MUNICIPAL COURT
OF ENIDAGO.

MR. PRESIDING JUSTICE MOSURILY DELIVERED THE OPINION OF THE COURT.

Defendant by this writ of error seeks the reversal of a judgment against him of \$1470 entered upon the verdict of the jury. Confession of judgment was originally entered on a note executed by defendant to the order of plaintiff. heave was given to defend and upon trial the judgment was entered.

Plaintiff is a corporation engaged in the real estate business and the note represents brokers' fees claimed to have been earned by it. B. F. Dombrow, Peter Cleek and Stanley Dasinski, witnesses for plaintiff, are members of the plaintiff company, Basinski being its attorney. Defendant owned property on Marshfield avenue, where he lived. He has no schooling and cannot read and has difficulty in understanding the english language. Defendant testified that Oleck called on him at his nome and inquired if defendant's property was for sale. Oleck then took him in an automobile to four or five places and to 4049 South Medzie avenue. Defendant indicated that he might be willing to exchange his property for the South Medzie property if terms of exchange were satisfactory to him.

The owners of the respective properties, with the brokers, met in the office of plaintiff and Basinski drew up a contract in which defendant is the celler and Peter Siwinski, Kate Siwinski and Stanley Lakoniak the purchasers. Basinski started to read it in English but defendant told him that he could not understand everything in the English language, so Basinski read it in Polish. It

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is dated November 19, 1927, bears the signature of the parties and was recorded November 21. It provides that the defendant shall pay to \$1470 as "Brokerage Fees;" the other party also pay fees. The note in question representing the fees to be paid by defendant was given at the same time.

There is a dispute as to the terms. Defendant says he was to get \$7,000 in cash and claims to have been misled as to certain other matters which it is not necessary to notice as the case must be decided upon another point.

contract between the seller and purchasers. It is not a case where plaintiff has precured a purchaser ready, willing and able to buy upon the terms proposed by the seller. Cases cited by plaintiff on such facts are not in point. Here, plaintiff did not produce such a purchaser, but its claim is based upon the contract itself.

Under such circumstances, unless it can be shown that the plaintiff has produced a valid and enforceable contract between the parties, it has performed no services entitling it to the fees mentioned in the dontract. Valenary. Landon, 246 lil. App. 606; Vilson y Mason, 153 lil. 304; Young v. Trainor, 153 lil. 428; Jenkins v. Sellings-worth, 83 lil. App. 139; Carroll v. Leafgreen, 170 lil. App. 328.

We hold that the contract is so vague and indefinite as to be unenforceable. The centract provides that defendant agreed to convey his property on Earshfield avenue at a price of \$49,000 clear, and the other parties agreed to convey the South Medrie avenue property at \$37,000, subject to encumbrances of \$17,000. The centract provides that the seller (the defendant) agrees "to produce a first mortgage of about \$18,000 or more and for not less than 3 years or for 5 years if possible with interest at 6% per annum, payable semi-annually." A similar indefiniteness as to the mortgage was held to make the contract unenforceable in Sluka v. Sielicki.

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335 Ill. 202; London v. Deering, 325 Ill. 589.

The contract further provides: "The seller also agrees to leave to the purchaser a junior mortgage which is to be a purchase money mortgage for the difference between the said first mortgage and the equity of the purchaser on his property." This is ambiguous. A slight consideration shows that it cannot mean literally what it says. The price at which the seller's property was fixed was 349,000 clasr. The price of the purchasers' property was \$37,000, subject to encumbrances of \$17,000, leaving the equity of the purchasers property at \$20,000. If the seller placed a mortgage of \$18,000 on his property, his equity would be \$31,000. The difference between the equity of the purchasers - \$20,000 - and the amount of the first mortgage of \$18,000, which the contract provides for, is \$2,000; but the actual difference between the \$20,000 equity of the purchasers and the \$31,000 equity of the seller is \$11,000. What then becomes of the 39,000, the difference between the \$2,000 junior mortgage and the \$11,000, the difference in value of the respective equities? The contrast does not tell us.

We are also in doubt as to just what is meant by the agreement for the seller "to leave to the purchaser a junior mortgage." On what property is this junior mortgage to be placed? The fact that a fairly close guess might be made as to what was intended does not make the contract definite and enforceable.

Realizing the uncertainty and ambiguity of the contract, Dumbrow was permitted to testify, giving his construction of it. His answers were merely conclusions and his testimony in this regard was incompetent. Leftus v. Chicago Rys. Co., 293 Ill.475; People v. Gewgill, 334 Ill. 635. The construction of the contract was for the court. Carstens Pack, Co. v. Sterms & Son Co., 286 Ill. 355.

We hold that the contract was so ambiguous and

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indefinite as to be unemforceable and therefore the sale consideration for the note sued upon failed.

At the conclusion of the evidence the defendant moved the court to instruct the jury to find for nim. This motion was everruled and the instruction refused. As we have indicated, the sourt should have found that the contract was unenforceable and that the consideration for the note had therefore failed. It was error to deny defendant's motion.

For the reason indicated the judgment is reversed.

and as in law plaintiff cannot recover in this action the cause

is not remanded and judgment of nil capial is entered in this
court.

REVERSED AND JUDIERET OF BIL CAPIAT.

Matchett and O'Conner. JJ., concur.

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Estate of Mobeur Mussein, Decembed, Plaintiff in Error,

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CHICAGO RAILWAYS COMPANY, CRICAGO CITY RAILWAY COMPANY, CALUMET AND SOUTH CHICAGO RAILWAY COMPANY and SOUTHWARE STREET HAILWAY COMPANY, Corporations Doing Business as CHICAGO SURFACE LINES,

Defendants in Error.

OF GOOR COUNTY.

ER. PRESIDING JUSTICE MESURELY DELIVERED THE OFINION OF THE COURT.

Hobour Hussein (hereafter called plaintiff), a young woman mineteen years of age, fell or was thrown from a step of a street car caned and operated by defendants, receiving injuries from which she died. The administratrix of her estate brought suit for damages. At the close of all the evidence the court instructed the jury to find for the defendants, which was accordingly done. We are asked to reverse the adverse judgment.

The question for determination is the propriety of the peremptory instruction to find for the defendants. In the well known case of Libby, McMeill & Libby v. Gook, 222 Ill. 206, the rule is stated that, if there is any evidence in the record from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material avergents of the declaration have been proven, the case abould be submitted to the jury. When a motion for a peremptory instruction is made by the defendant, if the court is of the opinion that in case a verdict is returned for the plaintiff it must be set aside for want of any evidence in the record to sustain it, a verdict should be directed. If the court is of the opinion that there is evidence in the record which, standing alone, is sufficient to sustain such a verdict, but that such a verdict if returned must be set aside because against the manifest weight

MERGAT EACOAN, Administrately of the Estate of Hobert Mussein, Decoased, Patentiff in Mercy,

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CRICAGO MAILS COMPAY, MICADO CITY MAINTAY CO. 687, MALUNCO KO SCOTA CRICAGO MAIL ON MARCANT AND MATERIAL MATERIAL OF AN MATERIAL OF AN OFFICE AND MATERIAL AND MATERIAL MATERIAL OF AN OFFICE MATERIAL MA

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lebour Massein (her wither slied visintiff), m young women nineteen years of a, e, feli or was thrown the enter of a store of atreed and cane come for which which case of a will be a store the case of a subject of the damages. At the which the structure the court instructed for damages, at the close of all the structure, the articular that court instructed the damages are the court instructed the damages. We have deep the close of the court in the court that the damages of the court in the court in the case of the court in the court in the case of the case of the court in the case of the court in the case of the case

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eases). To held otherwise is to deny to plaintiff the right of trial by jury. There may be in a record evidence which, standing alone, tends to prove all the material averagents of the declaration, and which is therefore sufficient to support, warrant or sustain a verdict in favor of plaintiff, and yet, upon the whole record the evidence may so prependerate, against the plaintiff that a verdict in his favor cannot stand when tested by a motion for a new trial."

The declaration alleged that Hobour Hussein was a passenger on defendants' street war, that she went to the rear platform and in the exercise of due care and caution for her own safety was alighting from the car at Flourney street, which had stopped there for this purpose, but defendants' servants negligently failed to give her a reasonable opportunity to alight but started the car forward with a jerk before she had fully alighted therefrom, so that she was thrown forward from the platform to the street, thereby sustaining injuries which resulted in her death.

The accident happened about eleven o'clock in the evening of August 31, 1922, at the intersection of Kedzie avenue, which
runs north and south, and Flourney street, which runs east and west,
in Chicago. Plaintiff and her sister, Krs. Bagdadi, the administratrix here, were passenger on a southbound Kedzie avenue ear. Their
destination was their home in the block on the west side of Kedzie
and a little south of Flourney. The car stepped on the north side
of Flourney street, and the decisive question is whether at this
time plaintiff, while in the act of alighting, was thrown to the
street by the sudden starting of the car or whether ahe fell or
jumped off while the ear was crossing the south crosswalk of
Flourney street.

Defendants strongly urgs that the testimony of the two witnesses for the plaintiff is so vague and uncertain and contradictory as to have no probative effect whatever and hence the

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peremptory instruction for the defendants was proper.

The first witness for plaintiff was Louis Rajcen, who testified that he was on the rear platform of the car; that when it stopped at Flourney street "one lady" (the plaintiff) "wanted to go down off the car, she was on the full step already - the lady was on the step \*\*\* and she was bolding with one hand the iron bar and at the same time that conductor ring the bell and the car start to go on full speed and she fell down with her face forwards. And again: "she just went to step down on the ground from the right step and that second the conductor ring the boll and the car put it right on the speed."

Mrs. Bagdadi testified that she rung the bell for the conductor to stop at Flourney street and they got up for the purpose of alighting there; that her sister went first; that her sister "take her foot from the platform, she was holding that iron board that grab handle, and then she goes to put the other foot down on the stairs and the car jerked and she fall." The says that the car was standing still when her mister started to slight.

Both of these witnesses were of foreign birth and evidently had considerable difficulty in the use of the English language. They gave other testimony to the effect that the plaintiff fell at the couth crosswalk of Flourney, which, it is argued, squarely contradicts their testimony that she fell as the car was starting from morth of Flournoy. The fact that these witnesses, because of their unskilfulness in understanding or speaking English, seemingly gave confused or contradictory statements, goes to the weight of their evidence. Both of them testified substantially that the accident happened as alleged in plaintiff's declaration. There was some

cause remanded. REVERSED AND REMARDED.

For the reasons indicated the judgment is reversed and the

evidence tending to prove the averments of the declaration and

the cause should have been submitted to the jury.

personptory instruction for the desendants were proper,

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PHIL V. VOSTER, Appeylant,

WARD PERRY, A. H. TOWESKED and PALE BEACH REAL ESTATE CO., a Corporation,

Appelloes.

255 I.A. 55'
APPEAL PHON SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDIEG JUSTICE MESURELY DELIVERED THE OPISION OF THE COURT.

This is an action in trespass on the case on promises tried by the court without a jury, which found against the plaintiff. From the judgment of mil capiat he appeals.

Apparently no issue was made as to the Palm Beach Real Estate Company. Plaintiff attempts to fix liability for \$40,000 on the other defendants, Ward Perry and A. H. Tewnsend, by virtue of sertain mortgage notes executed and delivered to the plaintiff by the Palm Beach Real Estate Company as part payment for Florida land sold to it by plaintiff. The first count of plaintiff's declaration declared on these notes and the second count was for the balance of the purchase price of the property claimed to be due from all the defendants.

Plaintiff first argues that the evidence shows that all of the defendants were joint adventurers or partners in the purchase of the land in question. Perry and Townsend (bereafter called defendants) deny this.

The Palm Beach Real Estate Company is a Florida corporation with an office in West Palm Beach, Florida. George C. Moore was its president and J. C. Christ its vice-president. Earch 7, 1925, this corporation by its vice-president, Christ, wrote a letter to the defendant Townsend in Chicago to the effect that if he, Townsend, wished to come in with the Palm Beach Real Estate Company on the purchase of some land, "You may do so if you act at once." A rough sketch plat was enclosed together with a statement as to the price the company was paying for the

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full power to sell the property without consulting the defendants, and, "Now, if you want to go in this way, get busy. I repeat, we are buying it ourselves, whether you go in or not, but just to show you that we are a good bunch of scouts we will let you go 50-50 on the above deal." The letter also stated that the company was "putting up \$5000 this afternoon."

Plaintiff's Florida attorney, Mr. Bryan, testified that the sale was consummated "around Earch 9," On this date the notes, part of which are the subject matter of this controversy, were executed and delivered to plaintiff by the Palm Beach Real Estate Gempany by George C. Moore, president, under seal, and also a mortgage by the same company to secure these notes, and a deed was delivered by plaintiff running to the Palm Beach Real Estate Gempany. March 16th Townsend wrote to the Palm Beach Company accepting the proposition to take a half interest in the property and enclosing checks of Mr. Perry and of himself as an initial payment. On account of some objections to the title of plaintiff a portion of the cash payment was not made by the Palm Beach Company until about April 1.

The trial court could properly conclude that when the first letter was written to the defendants by the Palm Beach Real Estate Company on March 7th, the company had already contracted with plaintiff to buy the land. The statement that the company was "putting up \$5000 this afternoon," among other like expressions, proves this. It is pertinent to suggest that, although this contract was in writing, it was not produced by plaintiff upon the trial. The letter of March 7th was an effer to let defendants have a one-half interest in the transaction. The statement, "we are buying it curselves, whether you go in or not," shows that the sole

property. The latter further stated ".mt the company must retain full power to sell the property sitence consulting the defendance.

and, "Now, if you want to go in this way, get busy. I repeat, we see buying it ourselves, whether you an or not, but just to show you that we are a good bunch of secute we will let you go show you that we are a good bunch of secute we will let you go 50-50 on the above heal." The latter also stated that the company was "putiting up 30000 the alternoon." The latter will be as seriese to seriese to since will be as seriese.

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The letter of largh Tell was not excluded by place att upon the trial.

The letter of largh Tell was not excluded by place attendent to the trial.

purchaser was the Palm Beach Real Estate Company. The court could find that the purchase was consummated about warch 9th, when the motes with the mortgage were executed and delivered by this company, which was about a week before the defendants indicated a willingness to go into the matter. The interest and some of the notes were paid by the Palm Beach Real Estate Company. Plaintiff testified that he did not know whether Perry and Townsend were associated with the Palm Beach Company in the purchase of the property. The record will not justify a conclusion that Perry and Townsend were joint adventurers in the purchase of the land.

Another reason May plaintiff cannot prevail is that under the Regotiable Instruments not only the parties to the paper are liable on it. Paragraph 30, chapter 30, provides that, "No person is liable on the instrument smose signature does not appear thereon, except as herein otherwise expressly provided." The exceptions referred to do not include such notes as are here under consideration. The Feople v. Kichigan Avenue Trust Co., 229 Ill. App. 512.

The court properly excluded subsequent letters with reference to the dealings between the defendants and the Palm Beach Real Estate Company. Undoubtedly Perry and Townsend were interested in the matter after March 16th, but letters after this date would not be relevant touching any claim that they were liable on the notes. They could not in any manner establish any privity of contract with the plaintiff.

Plaintiff presents a number of cases touching partnership relations, but these cases for the most part involve
chancery proceedings for an accounting, in which, of course, all of
the correspondence between the alleged partners is competent. Such
citations are not in point in the case before us, where plaintiff
seeks in an action of law to hold defendants obligated upon the

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notes.

It is said that the subsequent letters of the parties are admissible as tending to support the second count which claims a recovery for the unpaid balance of the purchase price. As we have already said, the sale to the Palm Beach Real Estate Company was consummated some appreciable, time before Perry and Townsend went into the matter. The plaintiff had accepted the PalmBeach Company as the purchaser and the contract of purchase had been executed. We know of no rule of law which would permit a recovery against parties subsequently acquiring an interest in the matter.

There can be no recovery on the theory that the Palm Beach Company eigned the notes as agents for Perry and Townsend. Where an agent signs a note which is accepted by the payee and it subsequently develops that the agent was acting for an undisclosed principal, it has been held that no action will lie against the principal. Ranger v. Thalmann. 82 N. Y. S. 846; Cragin v. Lovell. 109 U. S. 194. And that is true of contracts. Walsh v. Eurphy. 167 III. 228; Gardner v. Mackleton, 253 III. App. 333.

not permitted to take the stand for the third time to modify his previous testimony as to the time the sale was consummated. This witness had failed to produce the original contract of sale and had already testified as to the date it was consummated. It is largely within the discretion of the trial court whether or not a witness shall be recalled. Anderson Transfer Co. v. Fuller, 174 Ill. 221. The trial court committed no error in this respect.

Even if the witness had testified that the papers were first placed in escrow but not actually delivered until after April 1, it would not change the legal situation. The liability of the maker of the notes is fixed at the time of the escrow. Smith v. Goodrich, 167 Ill. 46. And if plaintiff delivered his deed in escrow, it was

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beyond his power to recall it. German-American Bank v. Martin. 277

Ill. 629; Gronewald v. Gronewald, 304 Ill. 11. The sale was a concluded transaction on March 9th, so far as the liabilities of the parties were concerned.

The evidence does not support plaintiff's claim that defendants Perry and Townsend were engaged in business under the name of Palm Beach Heal Estate Company prior to March 16th, or at any other time. They were interested in the profits of the transaction but this is entirely different from holding that they were engaged in business under the name of Palm Beach Real Estate Company.

The only obligation upon the notes or for any unpaid balance rests upon the Palm Beach Real Estate Company alono. We have not discussed all of the points made by respective counsel but have only referred briefly to the underlying facts which seem to us decisive of the issue. We hold that the finding of the trial court was proper, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Conner, JJ., concur.

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PETER SIVIESKI, KATIE SIVIESKI and STANLEY LANGMIAK.

Appellants,

GRORGE STASZAK,

Appellee.

250 I.H. (000)

APPEAL PROM MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE MOSUREM DELIVERED THE OPISION OF THE COURT.

This is semething of a companion case to Figure Realty Co. v. Staczak, number 53739, in which an opinion has been filed this day. In the present case upon trial the verdict was in favor of the defendant; from the judgment thereon plaintiffs appeal.

The contract of the plaintiffs with the defendant was for the exchange of their respective real properties and recited that each party thereto had executed a judgment note for \$5,000 as liquidated damages in case either party refused to perform its part of the contract. In this case plaintiffs took judgment against defendant by confession on the \$5,000 note given by him, which judgment was subsequently vacated and defendant given leave to defend.

It is admitted that defendant refused to go through with the exchange of property for the reason, as he claims, that he was to receive a certain amount in cash which was not forth-coming. The court was evidently of the opinion that the contract was so vague and indefinite as to be unenforceable and upon motion directed the jury to return a verdict in favor of defendant, and judgment was entered accordingly.

In the prior case we held the contract to be unenforceable and in our opinion said:

"The contract provides that defendant agreed to convey his property on Marchfield avenue at a price of \$49,000 clear, and the other parties agreed to convey the South Redsie avenue property at \$37,000, subject to engumbrances of \$17,000. The contract

PETER AFFIRMAL, MATTH STUTIMENT OR STANKER LANGUILMENT APPELLMENT.

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GRONGE STRUCKS.

donation.

APPEAL THER DESIGNATION OF THE COURT

YENGER THE JUSTICE OF THE OGUET.

This to constitut of a confidence to pictor cases to Picper Reality Co. v. Picerai, camber 33736, in within an opinion has been filed this day. In the present case upon trial the verdict was in favor of the defendant; from the Judgment therean plaintiffs appeal.

The contract of the pickette and engerties with the detendant vanter the exchange of their respective real engerties and redited that could part the cash party charts and denuges is case in a sure party reduced to perform the part of the contract. In this case of the took fudgment against defined by dentential on the first case by his, epich fulgment against defendant by dentential value of the delacation of the first case to defend.

It is administed to the respect to the respect to the respect to go tempth the exchange of property for the respect, and he wish, that he was to precise a certain empired in and which ear not forther. The court was evidently as the optimal of the contract of a contract was not for another was no value of the first interface and interfer as to be an enterested the fary to return a vertice to the even of fermions, and farenced the fare to return a vertice to the even of fermions, and farenced the fare to return a vertice to the even of fermions.

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\*\* Property on Appair provides sin. derindant intend to convey has property on Appair id avenue at a price of parties, and the other parties appared to convey the double hedget arenar parties appared to convey the double hedget. The contract

provides that the seller (the defendant) agrees 'to procure a first mortgage of about \$18,000.00 or more and for not less than 3 years or for 5 years if possible with interest at 6% per annum, payable semi-annually.' A similar indefiniteness as to the mortgage was held to make the contract unenforceable in <u>Sluka v. Bielicki</u>. 335 Ill. 202; London v. Doering, 325 Ill. 589.

"The contract further proceeds: 'The seller also agrees to leave to the purchaser a junior mortgage which is to be a purchase money mortgage for the difference between the said first mortgage and the equity of the purchaser on his property. ' This is ambiguous. A slight consideration shows that it cannot mean literally what it says. The price at which the seller's property was fixed was \$49,000 clear. The price of the purchasers' property was \$37,000, subject to encumbrances of \$17,000, leaving the equity of the purchasers property at \$20,000. If the saller placed a mortgage of \$18,000 on his property, his equity would be \$31,000. The difference between the equity of the purchasers - \$20,000 and the amount of the first mortgage of \$18,000, which the contract provides for, is \$2,000, but the actual difference between the \$20,000 equity of the purchasers and the \$31,000 equity of the seller is \$11,000. What then becomes of the \$9,000, the difference between the \$2,000 junior mortgage and the \$11,000, the difference in value of the a respective equities? The contract does not tell us.

"We are also in doubt as to just what is meant by the agreement for the selfer 'to leave to the purchaser a junior mortgage.' On what property is this junior mortgage to be placed? The fact that a fairly close guess might be made as to what was intended does not make the contract definite and enforceable."

It is well settled for a contract to be binding it must be definite in all its provisions and this is particularly

provided that the criter, the detendent) agrees 'to proud a liver marked to provide a liver marked to the standard of the stan

main toling only takenousty toling fortings will agrees to leave the tre entropement a family may again to be been entity the and meaning the till the contract the second the contract the mortgade the the the tally of the entropyment or all preparty. This te TOTAL STANDER OF A THE STANDARD OF THE STANDAR say retenuate at welles and notice to select the series of lade willes TOR 337. Sour supring to enguerances of 137, 'C, browin, the emilto as the sale of the continue of in the of them gilder will yither we all no other to be an appropriate The Aliferance between the eqtity of the cultivaters - the grap the one info the target mentages the target and to be the come and base mel dana a materalia sama. The for long a set and the one to estimate of the one to be unknown and to estimate while ending the first things will be seen and the state of the contraction between the "grand Markor More one the sale of the selection of the select La some ore torrest or the terrocal control of the . T S

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true where real estate is involved. Guzik v. Tomszak, 197 III.

App. 484; Breitenstein v. Independent Button & Kachine Co., 192

III. App. 399; Radzinski v. Ahlswede, 185 III. App. 513; Eason v.

Leith, 60 III. App. 527; Church v. Eoble, 24 III. 292; Canteberry
v. Miller, 76 III. 355; Sluka v. Bielicki, 335 III. 202; Young v.

Farvell, 146 III. 466; Hamilton v. Harvey, 121 III. 469; Kahrzewski
v. Fisher, 278 III. 557.

We hold that the instant contract is so vague and indefinite in its terms as to be unenforceable.

For the reason indicated we hold that the trial court properly instructed for the defendant and the judgment is affirmed.

APPIREZD.

Matchett and O'Conner, JJ., concur.

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JOHN E. KENCHTEL.

Defendant in Arror,

VB.

CHARLES H. SHAPIRO et al., Plaintiffe in Error.

CURTIS J. HOGPER. Plaintiff in Error. RRECH TO CHACULT COURT OF

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

John E. Knechtel filed a bill against Charles H. and Sarah Shapire and others to foreclose a trust deed which conveyed lots 24, 25 and 26 in block 4 in Benedict's subdivision, Chicago, to secure notes of the Shapires representing an indebtedness of \$2,000. Judgment creditors and other parties interested were made defendants, were served, appeared and answered.

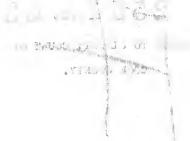
The Shapiros filed a plea which, however, was never set for hearing. The cause was put at iasue and without objection referred to a master, who heard the evidence and made a report, to which no objections were filed before the master or exceptions before the chancellor.

The bill was filed December 16, 1927. Pending the proceedings, without objection a receiver was appointed for the premises, which were improved and in part occupied by the Shapiros. On August 31, 1928, without objection from any party, a decree of foreclosure was entered. The muster sold the premises and filed his report of sale and distribution, showing payment to complainant of \$6121.62 and a deficiency due to complainant of \$39.52, for which, without objection, judgment was entered and the report (also without objection from any of the parties) approved. On January 4, 1929, again without objection, an order was entered that the received pay a coupen note of \$315 due on the first mortgage.

JOHN L. HENCHTEL.

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On May 7, 1929, Hooper, who was not a party of record in the trial court, sued out this writ of error. In his assignments of error he asserts that he is a terre tenant, a successor in interest of the Shapiros and an assignee of certain of the judgment creditors. He prosecutes this writ of error alone, an order of severance having been entered as to all the defendants.

The notes which the trust deed was given to secure; were judgment notes, and the bill avers that prior to the filing thereof on September 6, 1927, he confessed judgment upon the same for \$2317.49, but that complainant had received no moneys or payment on the judgment whatever; that a bailiff's sale was had of the real estate and that complainant purchased the same and received a certificate of sale from the bailiff; that this certificate was recorded and was held by complainant as further security for the payment of the notes.

The plea of the Shapiros averred that a judgment had been entered upon the notes and that an execution issued and was levied on lots 24, 25, 26 and 27 in block 4. wherefore they denied the jurisdiction of the court, and Hooper new contends in this court that the notes and mortgage were discharged by reason of these proceedings on the part of complainant. This is the prancipal error assigned and argued. Authorities from other states are cited. which we do not deem it necessary to discuss at length since it is the well established rule in this state, regardless of what the rule may be elsewhere, that the remedies by foreclosure of a mortgage in equity and a suit upon an indebtedness secured by a mortgage at law, are concurrent remedies; that the same may be followed simultaneously or successively and that the exercise of one remedy does not bar the other. Fish v. Glover, 184 Ill. 86; Haxle v. Bondy, 173 Ill. 302; Henry v. Hedge, 171 Ill. App. 10; Chicago Title & Trust Co. v. Edene, 187 Ill. App. 238.

In the trial sourt, sued out this writ of error. In his sesignsents of error he asserts that he is a terre temant, a successor
in interest of the Shepiros and an assigner of ourtain of the
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Bud from but a rani borrown worlyadd on's to naic any our has bosent aut knew at their the associable appropriate meet levied on lote 24, 25, Al and 27 in block 4, wherefore they denied the jurishiction of the court, such accept now contends in this the that the moter are morterand were discipling the reason of these proceedings on the nart of completient. This is the practical error assigned and argued. Authorities from ather spetce are cleek, which we do not deem it necessary it 'isolas as innerth since it is the well established rule in take state, regarden of want the THE MRY DO WINGSTON CORT THE TRANSPER BY I'. - OL . - TR OF BOTTO eage in soulty and a suit won an inderications areneed by a mertrage at law, the contentront for adjour that the bake hay be followed simultanequely or succeedity on the carrets of the transfer does not her the caker. Firk v. where, 164 111. Of Marle v. Roady, 173 111. 202; Morry v. roden, 17) 111. Mor. 10; Chicago Title to Truet Co. v. sidence, 167 ill, apa. 256. The master in his statement of the account between the parties found that complainant was entitled to an allowance of \$2520 for repairing the building, decorating the flats and for installing a new radiator, window frames and two Arcola heaters; that complainant advanced said sum by an order or court first had and obtained; that the advances were necessary and proper under the terms of the trust deed and should be allowed as a part of the principal indebtedness, and the decree makes the same final.

Hooper contends that the court erred in decreeing that this sum should be added to the indebtedness of complainant, and says that there is no allegation in the bill, finding by the master or a decree, or any evidence showing that the trust deed authorized complainant to make such repairs on the premises and to charge the same as additional indebtedness; that there is no proof or finding that the amount alleged to have been paid was the fair, customary and usual charge for such repairs or that the same were necessary to preserve the security of knechtel. Attached to the bill is a copy of the trust deed by which Shaparo was obligated to keep the premises in repair.

The questions of fact, we think, (assuming that plaintiff in error has the right to be heard upon the issue) may not be considered in the absence of objections before the master or exceptions before the chanceller. Walker v. C. M. & F. R. Co., 199 Ill. App. 610; Gehrke v. Gehrke, 190 Ill. 166. We are not unaware that this rule does not apply where only the legal conclusion of the master is questioned as a proposition of law. Strang v. Allen, 44 Ill. 428; Von Platen v. Winterbothsm. 203 Ill. 198; Gillett v. Chicago Title & Trust Co., 230 Ill. 373.

The decree of the Circuit court is therefore affirmed.

AFFIRMED.

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F. J. WILLIAMS, EDWARD BERNAUL

Plaintiffs in Error.

JOSEPH E. DAILY, DRUGILLA R. DAILY and FRANCIS L. BAILY.

Defendants in Error.

BERROL TO CINCUIT COURT

MR. JUSTICE MATCHETT DELIVERED THE OPISION OF THE COURT.

On August 10, 1926, complainant Joseph E. Daily filed in the Circuit court of Cook county a creditor's bill based upon a judgment in his favor and against defendant F. J. Williams, entered in the Circuit court of Peoria county on November 6, 1925.

The bill stated that the judgment was for the sum of \$15,920 and costs; that a transcript of the judgment was duly filed and docketed in the office of the clerk of the Circuit court of Cook county; that execution issued against the defendant and was delivered to the sheriff of Cook county, where defendant resided, and was by the sheriff returned wholly unsatisfied, he certifying that he could find no property in his county whereonto levy or to make any part of the amount thereof.

The other averments usually made in bills of this kind were also set forth, and Edward Bernahl and Gerald A. Rolfes were made defendants, it being averred that they held in their names real estate which was in fact the property of the principal debtor, Williams, and which should be subjected to the satisfaction of the judgment.

Summons issued against the defendants and was returned as served upon Williams on August 14, 1926.

Defendant Rolfes appeared and answered, denying that he held any property belonging to Williams.

Bernahl answered, admitting that certain premises

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(a August 10, 1926, complained Joseph 2. Daily Filed is the Circuit sourt of Cock county a creditor's bill based upon a judgment in his favor and against defendent F. J. Williams, entered in the Circuit court of Pectin county on extender 5, 1925.

The fill stero; that the factors of the former and for the sum of \$15,220 and costs; that a transmitted or the judgment was quity first and domested in the office of the object as the first that exacults because duping the interference of the the case of transmitted that county, where the fact has resided, but was by the county of the start of the that as property in his county whereon a tery or to make any purt of the amount thereof.

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described in the bill, to which he held the record title, were held by him for the use and benefit of defendant Williams.

of complaint he had not been informed as to the entry of the judgment, the filing of the transcript thereof in Cook county or the return of the execution nor as to whether the judgment was in full force and unsatisfied, but denying that the full amount of the judgment was equitably due. He admitted that Bernahl held the title to the real estate in question in trust for him and that he was the sole owner of it subject to certain liens and certain other equitable proceedings.

A further defense interposed by the answer was that complainant practiced fraud in entering judgment on the note. which was a judgment/ The answer of Williams averred that the note was delivered to Francis L. Daily, a brother of complainant: that at the time the note was delivered Bernahl had executed and acknowledged a deed conveying the premises, with the name of the grantee left blank; that the said note and deed were delivered to Francis L. Daily under an agreement that he, Williams, should pay the note, or in case he did not that Francis L. Daily had full authority from him to fill in the name of the grantee in said deed and accept the deed in full payment and satisfaction and discharge of said note, which in such case should be cancelled and surrendered; that Francis L. Daily during the absence of Williams from the State of Illinois and without his knowledge and consent, and contrary to his agreement, filled in the blank in the deed with the name of complainant as grantee and filed the deed for record in Cook county on October 16, 1925, and that by reason thereof the note was fully satisfied and discharged and should have been cancelled and surrendered instead of jud; ment being entered thereon.

Exceptions to this answer for scandal and impertinence

described in the bill, to which to be recording were held by him for the use and possible of determinate Filliage.

Filling abstared, serving that, exect by she till of complaint as had not been inferred as to the entry of the judgment, the illing of the formal entry of the return of the executive her as to whether the judgment was to fall force and unsatisfied, but tengths had the judgment was equition, but tengths had the judgment was equitionally one. We admitted that horizont was he till to succeed the tength of the unit was he said the constant him to the said the constant him to the her said owner of it subject to cartain limit other equitionic proposition.

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were filed by the complainant, which were sustained, except the first, second, fourth and fifth paragraphs, and the clerk ordered to expunge the scandalous and impertinent matters, on January 3,1927.

oross-bill making defendants thereto the complainant Joseph E.,

Francie L. and Drusilla R. Daily. It set up in substance the same
matters which had been expunged; averred that the deed was in fact
a mortgage, and prayed an accounting of the rents, that crossdefendants might be decreed to pay the amount found due and convey
the premises to cross-complainant, and that in default of such
payment the premises might be sold as in foreclosure proceedings;
or in the alternative, that cross-complainant be directed and decreed to forthwith satisfy and discharge of record the judgment
and for other and further relief.

To this cross-bill cross-defendants filed general and special desurrers, which were sustained.

The cause was referred to a master, who reported finding that the equities were with the complainant; that the judgment was in full force and effect; that the real estate ought in equity and good conscience be applied to the satisfaction of the judgment.

Objections filed by defendants were overruled by the master, and by order of the chancellor these objections stood as exceptions on the hearing before him. The exceptions were overruled and a decree entered in favor of complainant, which defendant Williams seeks by this writ of error to have reversed.

While these proceedings were pending in the Circuit court of Cook county, Williams made a motion in the Circuit court of Peoria county to set aside the judgment. The motion was denied and upon appeal by Williams to the Appellate court for the second district, the judgment of the trial court was affirmed. Daily v.

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Williams, 248 Ill. App. 669.

The sole question to be determined upon this record is whether, under circumstances such as are here made to oppear, the judgment debtor defendant to a creditor's bill may attack successfully the judgment upon which the creditor's bill is based. The averments of the answer, as well as those of the cross-bill, disclose, if true, that he had a perfect defense at law to the suit in which judgment was entered in Peoria county. That judgment was entered by confession does not lessen the presumption which exists in its favor. Goodwin v. Kix. 38 III. 115; Boyles v. Chytraus. 175 III. 370; Kason v. Griffith, 281 III. 246.

It is true that a court of equity has the power upon proper showing to set aside a judgment which has been obtained by fraud or as the result of accident or mistake, where the defendant to the judgment has not been guilty of negligence. Such is the general rule in the cases cited by defendant. Foote v. Despain, 87 Ill. 28; Loughlin v. Mulkey, 244 Ill. App. 646. In the latter case the court said:

"It is the general rule that where a court of equity has jurisdiction of the parties and the subject matter of the litigation, it has authority for the purpose of administering equitable relief to adjudicate all the rights of the parties which are involved in the litigation. Old Colony Life Insurance Co. v. Graves, 200 Ill. App. 71; Roman v. Humphreys, 220 Ill. App. 502, and cases there cited. It is well established that a court of equity has jurisdiction to set aside a judgment at law upon proper showing. Hubbard v. Bational Stamping & Electric Works, 215 Ill. App. 255; Harding v. Hawkins, 141 Ill. 572; Friedberg v. DePew. 200 Ill. App. 397; Simpson v. Simpson, 273 Ill. 90."

There is, however, nothing in any of these cases which can be construed to hold that a defendant, who has failed to avail himself of the opportunity to present his defense in a court of law can, when proceedings are brought upon that judgment in a court of equity, be allowed to present the defense which he failed to interpose. It is distinctly held in Multenberg v. Anderson, 242 lil. 607,

#1111688. 248 111. App. 669.

The sole quantion to be determined upon this record is shelper, under circumstances such as are ners made to appear, the judgment debtor defendent to a creditor's bill may obtain successfully the judgment upon this the creditor's bill in based. The systemates of the answer, as well an those of the cross-bill, discione, if true, that he had a perfect defense at less to the soft in which judgment was entered in Februa sounty. That judgment was entered by confession does not hearth the prosumption which exerts in its favor. Staten v. Eight 35 lift, lift; Edwiss v. Cristans.

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that it would be inequitable to permit this, and there is a long line of well considered decisions in this and other states holding that such defense may not be intercosed in this manner. Elston v. Blanchard, 2 Scam. 421; Newman v. Willitte, 60 Ill. 519; Sawyer v. Meyer, 109 Ill. 461; Thoening v. Hawkins, 294 Ill. 30; Chiniquy v. Christophel, 318 Ill. 101; Bowman v. Wilson, 64 Ill. App. 73; Tilton v. Goodwin, 183 Mass. 236. In this case there is the additional circumstance that pending these proceedings defendant sought to interpose his legal defense in the Circuit court of Peeria county and that the decision of that tribunal contrary to his contentions was sustained by the Appellate court upon review. Baily v. Williams, 248 Ill. App. 669. It would therefore appear that defendant's contentions have already been adjudicated. Rork v. McDavid, 91 Ill. App. 262; Black v. Thomson, 120 Ill. App. 424. Keither in the enswer nor in the cross-bill has defendant stated facts which in a court of equity could be construed as overcoming the presumption in favor of the judgment at law, and the decree of the Circuit court is therefore affirmed.

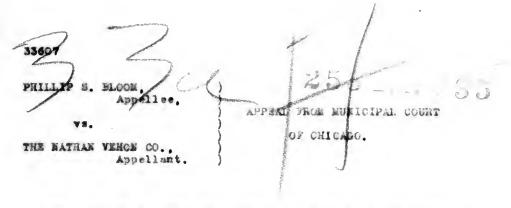
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McSurely, F. J., and O'Connor, J., concur.

that it sould be inequitable to permit tite, and here is a ling lime of well considered decisions in the and stars atomes il im. that such defense may not to inter oned in this namer. Ellient. Manchard, 2 Seen. 191; Seenan v. Sillitis. A 111. 319; Aster v. 29797, 100 111. 461; ISCHNIS, V. : WALDE, 294 111, V; 15,116 207 V. Caristophal, 11 111. 101; however v. \$1100a, 51 1.11, vap. 75; Tilton v. woodain, 181 soos. 244. In buist case 1 ere in the givin rdg. sa janinaltaj agaifinastar aseni gulines iani anu incuratia ismail while taken at legal telegal at the contract of the analytic of encircature aid o' ginguocol femediri dado le galarca ani dadi bas was sumisined by the Appellate court spon review. Ushing Thilitan. #8 Ill. Ap . 369. It sull'd therestore appear that defentant's contantions have already been adjust cores. Tork v. offerid, 92 lil. Asc. 25%; Bl ck v. lhowneg, l'u (11. Asp. 424. saith r in boe snewer trong at mains sty. I test to decide the and Ilidenous off al ton of equity could be construed as cressions. Las prosecution for ret of the district at its, and the depend of the district to . "Sarific orolars,"

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MR. JUSTICE MATCHETT DELIVERED THE OPIDION OF THE COURT.

This appeal is by the defendant corporation from a judgment in the sum of \$25,701.19 entered upon the finding of the court.

employed by defendant prior to January 1, 1926, and that defendant promised to pay for his services during that year a salary of \$10,000; that there was paid on account thereof only \$3,130, leaving a balance of \$6,870; that plaintiff was likewise employed for the year 1927 at a salary of \$15,000 a year; that \$4,700 was paid thereon and that there is a balance due of \$10,300 for services rendered during that year; that during the year 1928 defendant agreed to pay plaintiff a calary of \$15,000 and that plaintiff performed services from January 1, 1923, to Ecoember 10, 1928, for which he was paid \$4,385.47, leaving a balance of \$8,531.19 for that year and making a total balance due of the amount for which judgment was entered.

A bill of particulars which in substance alleged these facts was filed by the plaintiff and stated that these agreements for services to be rendered were made by defendant through its president, Kathan Vehon.

The affidavit of merits denied that any such agreements were made by defendant through its president; averred that for five weeks in 1926 plaintiff was employed for compensation of \$50 a week and during the remainder of the year for compensation See Carcine The Const

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MM. MISTICS MAICHETT DELIVERED THE CRUERLOS OF THE COURT.

This appeal is by the defendant corresponding of the judgment in the sum of \$25,701.19 entered upon the finding of the court.

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and and all davit of merits desired that any such upresments sere ande by defendent through its president; averred that for the easts in 1885 plaintiff was employed for acceptantion of \$50 a vest and during the remainder of the year for companyation of \$60 a week, and that he had been paid in full for such services; that in 1927 plaintiff was employed by defendant at the agreed salary of \$75 a week; that he was paid the further sum of \$600 as a bonus, and that a further sum 6f \$200 was advanced to him during that year as a loan, which had not been repaid; that plaintiff was paid in full for all services rendered during that year; that plaintiff was employed by defendant during the year 1928 for the period commencing January 1, 1928, and ending Sovember 10, 1928; that for a portion of that year defendant agreed to pay plaintiff \$75 a week and for another portion of said year a sum of \$100 a week; that plaintiff had received a total sum of \$4,150 in full payment according to the agreement.

The affidavit further averred that on January 22, 1925, plaintiff became a director of the defendant corporation; that on January 12, 1927, plaintiff became the <u>de facto</u> secretary of the defendant corporation; that as such director and <u>de facto</u> secretary he was not entitled to the amounts claimed except upon the lawful adoption of resolutions by the board of directors of the defendant authorizing the payment of the same claimed, and that no such resolutions were ever adopted.

This law suit has been fought with the bitterness which usually attends family disagreements. Plaintiff is the brother-inlaw of Eathan Vehon, who was the president and treasurer of the defendant corporation. The corporation was organized in Illinois in
1922 or 1923 and was capitalized for the total sum of \$10,050 in
shares of \$10 each, of which only 670 shares have been issued and of
which Eathan Vehon owns 650 shares. Its principal business is the
manufacture and sale of silk, cotton and rayon underwear, a business
in which Eathan Vehon was engaged for more than a year prior to the
incorporation of this company.

of 160 a week, and that he and been paid in 1:1 for outh services; that in 1827 plaintiff was emply ad by defendant at the agreed asiany of 275 a week; trat he the paid ter further same at 1800 ms a salary of 275 a week; trat he for the their same at 1800 ms a salary of 180 and that a further some of 280 was adverted to 1m dening that year as a lean, which had not been recally that that the object of this intiff was smplayed by defendant faring the year leaf for the order of that year leaf that to the contact in the contact of the parties a pertion of that year defendant a rest to may plaintiff from much and for another portion of sali year a sum of its a week land to the received a total year a sum of its a week land to the agreement.

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The directors of the corporation are Nathan Vehon, the president, and his wife, Lena Vehon, who owns ten shares of the capital stock; her husband gave her this stock as a gift. Nathan Vehon, Lena Vehon and plaintiff, Phillip S. Bloom, were the only stockholders of the corporation. Plaintiff became a stockholder, director and the secretary of the company on January 22, 1925, ten shares having been issued to him by Nathan Vehon in order that plaintiff might qualify as a director of the corporation. The evidence indicates that Nathan Vehon has at all times absolutely controlled the affairs of the defendant corporation.

Plaintiff testifies that in January, 1926, he went to Matham Vehon and told him that he, plaintiff, wanted a salary of \$10,000 a year, and that Vehon replied that was all right with him, that he, Vehon, would also take a salary of \$10,000 a year, and that he wanted Mrs. Vehon to draw \$5,000 a year.

Plaintiff further says that thereafter Eathan Vehon showed him the minutes of a meeting of the board of directors which purported to fix the compensation of these persons at these sums.

Flaintiff further testified that about January 1, 1927, Wathan Vehon came to him and said that he was going away for a trip on account of the condition of his eyes; that plaintiff them said that there should be some understanding as to salaries; that the net profits of the business were large and that he, plaintiff, thought the salaries for the year 1927 should be \$15,000 each; that Nathan Vehon replied that would be all right with him, and that plaintiff should have the accountant draw up the records accordingly; that Nathan Vehon left sometime in January and returned in June; that before leaving he showed plaintiff the minutes, which are in evidence, indicating that the agreement had been carried out.

Plaintiff further testifies that in January, 1928, he told Eathan Vehon that plaintiff's salary ought to be \$20,000 a year;

The directors of the cereeration are Nathan Venen, the president, and his wife, herm Venen, who owns ten chares of the capital ctock; her husband gave her this stock as a hift. Sathan Venen, hem Venen and pisiniiff, Phillip 5. Sheem, were the enly stockholders of the corporation. Flaintiff became a stockholder, director and the corporation. Flaintiff became a stockholder, that director and the secretary of the campany on January 32, 1923, tem shares having been issued to him by Sathan Venen in order that plaintiff might qualify as a director of the corporation. The sylmanes indicates that stockholded the effairs of the defendant corporation. The sylmanes indicates that stockholded the effairs of the defendant corporation.

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Plaintiff testiffes that is Jamesty, 1976, he went to Mathew Venon and told him that he, plaintiff, wanted a country of \$10,000 a year, and that Venon replied that was all right with him, that he, Venon, rould also take a salary of \$10,000 a year, and that he wanted are. Venon to dress \$5,000 a year.

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that Vehon objected, saying that the salary should continue at \$15,000 and that at the end of the year he would vote some stock dividends. Plaintiff says he told Vehon that was all right with him and to have the accountant draw up the records.

books from the beginning of the business until the close of 1927, testified that he wrote the purported minutes of the board of directors meetings of 1926 and 1927 at the direction of the president, Nathan Vehon. He also testified that he prepared the income tax return of the corporation, of Mr. and Mrs. Vehon and of plaintiff for those years. These income tax returns were offered in evidence, are under oath of the respective parties, and show salaries of plaintiff, Nathan Vehon and Mrs. Vehon for the specified years as claimed by plaintiff. The testimony of plaintiff as to the amount of these salaries is also corroborated by entries in the ledger which the evidence indicates were made at the close of the respective years from the minute books.

Plaintiff also testified that the defendant corporation was practically insolvent when he entered its service and that his services had very much to do with securing the increased business which resulted in prosperity.

At the time plaintiff entered defendant's employment it occupied about 750 square feet of floor space, employed about fourteen persons, used about a dozen machines in its business, and its sales in 1924 amounted to \$75,000. When plaintiff severed his connections with the company the business occupied 75,700 square feet of floor space, the employees numbered over a hundred and the number of machines had increased to nearly a hundred and the sales to more than \$400,000 per annum.

Eathan Vehon testified in detail, denying that the company was insolvent when plaintiff was first employed and denying the that Vehon objected, saying that the sainty should continue at 115,000 and that at the oud of the year he said voice span stock dividends. Finintiff says he told voice that was all right with him and to have the accountent drug up the recerta.

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Plaintiff, bethen Venes and are, fetter for the same salaries of plaintiff, the testimony of plaintiff he to the secunt of these salaries is the entering the evidence indicates here each to the secunt the evidence indicates here each to the secunt the evidence indicates here each to the secunt of the evidence indicates here each to the secunt the evidence indicates here each to the secunt from the microscope to the close of the residence of the residence of the secunt of the evidence indicates here each to the trace of the residence of the re

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alleged admissions as to the value of plaintiff's services, and in particular he denied the conversations with reference to the salaries to be paid to plaintiff, to which plaintiff testified as hereinbefore recited. He also denied the conversations related by Weinstein, bookkeeper, to the effect that he, Vehon, directed entries in the books of such items. His explanation of these entries is as follows:

"I had a conversation with Mr. Weinstein about what the salaries for the officers of the company were to be in 1926. In the early part of 1927, and before I left Chicago he came and said, 'I know something,' he said, 'how to reduce income tax, and Mr. Weinstein said, You can put up \$10,000 for Mr. Bloom, \$5,000 for Mrs. Vehon and \$10,000 for yourself, and he says, You can remain on the books, we need only enter them, but he said, 'I don't know just how to enter it, but' he said, 'I will look it up and see what I can do.'

"Me said, 'They are all doing it.' I said, 'They are all doing it.' I said, 'I don't want to get myself into trouble,' and he said, 'Ko trouble at all, all you get to do is to do that,' and that is why those salaries were put up like they are."

Mathan Vehon further testifies that after the beginming of this suit he caused amended tax returns to be filed for the particular years in question and paid an additional tax on these amended returns of \$7,000.

Joseph A. Weiss, a public accountant employed by defundant, was subposensed by plaintiff and in rebuttal testified that in going to work for defendant he asked hr. Vehon about the back salaries as disclosed by the books and that Venon said, "They will be drawn up sometime during the year 1928." The witness further testifies that he must have taken the matter up with Mr. Vehon seven or eight times during the year and was told that the salaries would be drawn up, and he further says that Eathan Vehon never said anything to him about the salaries being put on the books for the purpose of reducing the income tax.

Weinstein in rebuttal also denied the alleged conversations with him in regard to reducing income taxes by making

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entries increasing the salaries, and the testimony of Weiss is not denied by Vehon.

The trial Judge who saw and heard the witnesses stated in making his findings that plaintiff's claim as to these salaries was established beyond a reasonable doubt. Certainly, this court upon review cannot say that the finding of the trial court is against the manifest weight of the evidence.

Propositions of law submitted by defendant have not been abstracted, but defendant in its brief urges upon the authority of <u>People v. Matthiessen</u>, 269 Ill. 499, that the purported steckholders' meeting of January 22, 1926, was void for failure to give notice to Lens Vehon, a stockholder, who, it is not disputed, was not present and did not consent to the holding of the meeting.

Further, on the authority of <u>Voorhees v. Mason.</u> 245 Ill. 256, and <u>Luthy v. Ream.</u> 270 Ill. 170, defendant contends that the purported resolution alleged to have been adopted at a directors' meeting on January 10, 1927, was void in that it gave compensation to an officer of a corporation where the resolution fixing the compensation was carried by his own vote. It is further contended on the authority of <u>Ellis v. Ward.</u>137 Ill. 509, and <u>St.L.A.& S.R.R.Co.v. O'Hara, 177 Ill.</u> 525, that an officer of a private corporation is not entitled to compensation for services rendered unless such compensation is fixed by a by-law or resolution adopted before the rendering of the services.

These authorities are not applicable to this record.

The affidavit of serits does not deny the authority of the precident Vehon to employ the plaintiff. It questions only the amount of salary which it was agreed should be paid. This defense was therefore waived. Cooper v. Anderson. 246 Ill. App. 1. Moreover, the services which plaintiff performed did not devolve upon him by virtue of his office in the corporation but under the

entries increasing the esisties, and the tastimony of size is not denied by Yebon.

The trial fudge who see and seed the witnessee of the seed of the making his findings that plaintff's claim as to these saturates was established beyond a remandant found. Cartainly, they court is upon review cannot say that the linding of the trial court is against the markers.

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who, as a matter of fact, was at all times in absolute control of the corporation itself, and therefore had prima facie authority to bind the corporation of which he was president. Hanover Coal Co. v. Pullen, 137 Ill. App. 559; Bank of Minneapolis v. Griffin, 168 Ill. 314; Trader's Mutual Life Ins. Co. v. Johnson, 200 Ill. 359; Quigley v. MacQueen, 321 Ill. 124; Wolf v. Ideal Sheet Letal Borks. 209 Ill. App. 252; Barnes v. All American Inv. Co., 200 h.Y.S. 278; Cerpus Juris, vol. 14-A. p. 361.

The propositions urged and cases cited by defendant are not applicable. It is unnecessary to discuss these cases in detail.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIREED.

McSurely, F. J., and O'Wonner, J., concur.

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RICHARD W. GILLIAM,

Plaintiff in Error,

VS.

PLORENCE F. GILLIAM. Defendant in Error. ERROR TO MUNICIPAL COURT

MR. JUSTICE MATCHETT DELIVERED THE POPULION OF THE COURT.

Plaintiff, Richard W. Gilliam, brought a suit in replevin to recover possession of a Chevrolet automobile. There was
a trial by the court with a finding for defendant. Motions of
plaintiff to set aside the finding for a new trial and in arrest
of judgment were denied and judgment on the finding with an order
for a writ of retorno habendo were entered.

The principal contention of plaintiff is that the finding of the court is against the weight of the evidence.

Defendant Florence Gilliam is the wife of plaintiff.
They separated on September 7, 1928, and a few days thereafter she filed a suit for separate maintenance. This suit in replevin was filed October 4th thereafter.

It is not disputed that plaintiff purchased the automobile in his own name and paid for it with his own money on karch 31, 1928, but defendant undertook to prove that plaintiff, after the purchase of the automobile, made a gift of it to her, and the question of whether the evidence sustains this defense is the controlling question in the case.

The undisputed evidence shows (as already stated) that plaintiff purchased the car in his own name on karch 31st; that he took out insurance on it in his own name on April 2nd, and that defendant on April 3, 1928, paid to the comptroller of the Village of Kaywood, where they resided, the sum of \$5 for an auto license, taking receipt therefor in the name of plaintiff and paying for the same out of her allowance from her husband for household ex-

RICHARD W. OLLSTAN, BETCE

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PLORENCE F. GLILIAN. Defendant in Error

MR. JUSTICE NATCHETT DELIVERED THE COLLIN OF THE CORP.

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THEOR THE MUNICIPAL COURT

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penses; that thereafter a license was obtained from the secretary of state of Illinois, designating plaintiff as the owner of the car.

quite frequently but did not drive it, and that defendant was the only member of the family who did drive the car. It further appears that some time during April of that year defendant drove the car to the place where it was purchased and had it simonized and that plaintiff paid the bill for this service, which was furnished after the time when defendant says he gave the car to her. She testifies that she, not plaintiff, paid for repairs made on the car (as already stated) out of money given her by plaintiff for household expenses.

Defendant's testimony with reference to the gift is:

"He said that it was an April fool present and surprise to me. He always said that it was my car. Well, when he gave me the car he said, 'The car is yours,' he said, 'how, you will have to pay the bills.' I paid the haywood tax. I went and got it myself. I paid for that out of my own household money. He bought gasoline for that car about twice since the first of April. He never bought oil for the car. He never had the car washed for me. I alone had to pay for the maintenance of the car."

Mrs. Fisher, the wife of defendant's brother, testifies that plaintiff and defendant were at their home on Master Sunday and that plaintiff said, "Come to the window and see Florence's new car," and she says that they want to the window and that plaintiff pointed it out. She also says that she heard the conversation on May 27th when plaintiff said it was an April fool gift.

The mother of defendant also says that on Easter Sunday plaintiff said, "Come to the window. Come on and see Florence's new car;" and she says that plaintiff pointed out the car to them.

It appears that at the time of the trial a suit was pending, brought by plaintiff against this witness and her husband, which charged them with alienating the affections of his wife. She says, however, "I wish him nothing but the best." The evidence also tends to show that the husband of this witness was present at the

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The rules of law as to the facts necessary to establish a gift inter vivos are well settled in this state and are set forth in the leading cases of Barnum v. Reed, 136 Ill. 388; Telford v. Patter, 144 Ill. 611, and the cases which follow those decisions.

In order to establish such gift, it is necessary to prove (1) that there was an intention on the part of the donor to transfer and vest the title and right of possession of the property in the donee; (2) that there was a delivery of the subject matter of the gift, and (3) that the owner parted with all control over the subject matter and divested himself of all dominion over it.

These cases also hold that the burden of proof is upon the party claiming the gift to establish it by a clear prependerance of the evidence.

It is unnecessary to review at length the numerous cases that have been cited. For obvious reasons less evidence would be required to establish a gift from husband or wife, who are living together, from one to the other, than would be necessary to establish a gift to a stranger. At the time of this alleged gift, these parties were living together but a few months thereafter separated. Whether the causes which brought about the separation arose suddenly does not appear.

The undisputed facts, however, that plaintiff bought and paid for the automobile with his own money; that the licenses were taken in his own name and paid for by him, and that the insurance on the automobile was carried in his name, seem to negative any intention on his part to make a gift or to transfer title to his wife. Giving full credence to the testimony for defendant as to the April fool gift, etc., we think the remarks testified to by

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her are not inconsistent with plainting's evident intention to keep the title to the car in himself.

The finding and judgment are manifestly against the weight of the evidence, and the judgment is therefore reversed with a finding of facts and judgment here for plaintiff.

REVERSED WITH FINDING OF FACTS AND JUDGMENT HERE FOR PLAINTIFY.

McSurely, P. J., and O'Connor, J., concur.

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Lasurency, A. A., and C'Connor, A., concur.

We find as facts that on March 31, 1928, plaintiff, Richard W. Gilliam, purchased and paid for the Chevrolet automobile which was replevied in this cause; that the same was delivered to him; that he thereafter produced and carried liability insurance in his name upon said automobile in the Continental Casualty Company and procured and carried licenses in his name from the Village of Maywood, in which he resided, and also from the Secretary of State of the State of Illinois; that he at no time made any gift inter vivos of said car to defendant, Florence F. Gilliam; that the evidence submitted in behalf of defendant is wholly insufficient to establish such gift; that the right of property and of pessession to said automobile is in plaintiff, and that judgment upon this finding should be entered in this court and for one cent damages for the detention of said property.

No find on facts that or the chart of 192. plaints; higher V. Dillian, parotaced and paid for the chart of the vice point and repieved in the tests control that the therefore produced and control liability historical him; that he thereafter produced and continuental Community Continues and produced and control of the test control to the control Community Control of the produced and control of the chart of the control of th

JOHN EALLINGER,
Appellee,
Appellee,
OF COCK COUNTY.

CARL N. BERGGREN and
ANNA DERGGREN,
Appellants.

MR. JUSTICE MATCHETT DELIVERED THE OPINIOR OF THE COURT.

This is an appeal by defendants from a decree entered in favor of complainant for the sum of \$4,025, with interest from August 18, 1927, in a proceeding to foreclose a mechanic's lien.

The cause was heard by the chancellor upon exceptions of defendants to the report of a master. The exceptions were overruled and the decree entered as stated.

The claim of complainant was based upon an alleged or all contract said to have been made between complainant and defendants on January 3, 1927, whereby complainant was to furnish plans and specifications and to superintend the construction of an improvement for five per cent of such estimated cost, less \$700 incurred by defendants for plans with other architects.

The defense averred was that no contract such as alleged in the bill was made, but, on the contrary, that complainant solicited the employment, stating that he would make class more satisfactory than those for which defendants were already obligated to pay, and agreed that no charge would be made unless the proposed building was actually constructed; that defendants as and oned the project of building upon the premises and afterwards sold the same.

As already stated, the master found the issues of fact and law in favor of complainant, and the chancellor has approved of the finding of the master.

Defendants contend that the decree should be reversed.

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where the services of an architect are not actually used in the construction of an improvement on cremises, and, secondly, because it is argued on the issues of fact that the decree is contrary to the manifest weight of the evidence.

In weighing the evidence it may be well in the first place to state some of the uncontradicted facts.

Complainant has for many years been a duly licensed architect, and at the time of the occurrences here in question maintained effices at No. 3323 North Clark street, Chicago. Defendants, who are husband and wife, at the time of the transaction in question owned in joint tenancy lots 1 and 2, a corner at Granville avenue and Lincoln street, Chicago. Lots 1 and 2 have since been sold, and defendants still own lots 3 and 4, which were purchased while the transaction in question was pending. Lots 1 and 2 were encumbered by a mortgage of \$12,000. Defendants had in mind the erection of an apartment building of 36 flats on these four lots; they had obtained a sketch of plan for a building of this kind from the Prudential Realty Company, for which they were obligated to pay \$700 if used and \$400 if not used.

Defendants' financial circumstances were such that in order to build it was necessary to obtain a loan, whic had not been done when Mr. Berggren first set complainant on January 3, 1927. The Berggrens lived in Oak Park and Mr. Berggren was the superintendent of the Gulbransen Fiano company.

There is a sharp conflict in the evidence as to the manner in which complainant and defendant Carl Berggren came into contact. Complainant says he learned of defendants' intention to build through a source which he does not recall, but at any rate the parties agree that on January 3, 1927, complainant went to defendants' place of business, presented his eard and solicited employment as an architect in connection with the proposed building.

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Defendent' diametal directions were the last that a content to build it was necessary to obtain a loan, whis sad par been done when Mr. Beengaren first met chaplainant on January 1.

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John E. Henson, a heating contractor, who is on Friendly terms with defendant and who since the time of these transactions has become unfriendly with complainant, says that he informed complainant of defendant's intention to build, suggested that he try for the job, and called Er. Berggren on the 'phone from complainant's place of business; that complainant and defendant them talked together on the 'phone and complainant said that he would come out to see Er. Berggren in a few days. Hamson says this was about the middle of December.

Er. Berggren says that he talked on the 'phone with complainant and told him to come and see him after the holidays; that on January 3rd complainant came to his office pursuant to that conversation.

Complainant testifies that Hanson did not call Berggren from his office; that Hanson did not give him Berggren's address but that "the other party did. Ass. I don't remember the other party's name."

The evidence is also conflicting on the question of whether Er. Berggren on January 3, 1927, informed complainant of the plans which had been obtained from the Prudential Realty Company. Complainant says he did not hear of these plans until about the first of May and that he first saw them about that time at his office where he checked them up with his own plans, he says that Er. Berggren then for the first time said that the Realty Company wanted \$700 for these plans and that he, complainant, then for the first time, promised to allow that amount to defendant at the time of final settlement.

Er. Berggren, on the other hand, says that on January 3rd he told complainant that he had these plane, showed him the sketches and told complainant that these would have to be paid for; that complainant then said he didn't think the plans amounted to much, that he could put up a cheaper building, one easier to get a

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lean on and that on account of complainant's friendhaip for Manson he would make a special proposition, that he, complainant, would draw the plans, supervise the building, let the bids and help him to get the mortgage, for a consideration of three per cent, and that if defendant should decide not to use complainant's plans he would not charge him at all. Er. Berggren further says that complainant also stated that he did not think it would be difficult to get a loan of \$140,000 and that he thought the building could be put up for \$100,000 to \$125,000.

Hansen testifies that at a later time in January he talked to complainant about the matter, telling him of the proposed terms as related by Mr. Berggren, and that complainant said he "would take a change."

Complainant mays nothing was said about the cost of the proposed building; that defendant said nothing about other plans. He mays:

"I told him the charges were five per cent pro rated on the Illinois Society of Architects' schedule, 'and that includes plans, supervising,' I says, 'possibly.' I told him we have to make those sketches over two or three times, and we take care of the building, supervising. Well, he thought that was all right -- a man is entitled to his service; so he stated what his intention was to do; to put up a building there, and get as many apartments on the ground as possible. He said that time the ground was 110 by 145 feet deep. That was the southwest corner of Granville and Lincoln."

Complainant says that he did not have a schedule there of the charges of the Illinois Architects' Society and is positive that no sketches were shown to him. He says that he did not ask defendant for any money on account when he started; that when the preliminaries were completed about the middle of April he was entitled to one-tenth of his fees, but that he did not ask defendant for it and that nothing was said about it; that in the fore part of March Mr. Berggren called him and told him to so shead and complete the plans, to get as much bay window as he sould and to make the rooms as large as possible. Mr. Berggren testifies that he had

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no such conversation with complainant.

on August 18, 1927, complainant says he was entitled to seven-tenths of his fees but that he had not said anything to Er. Berggren about money up to that time and did not send him a bill. In the meantime Er. Berggren had unsuccessfully tried to get a lean of \$140,000. In the first part of September or the latter part of August complainant learned that defendant would not build in 1927. In October he called up Er. Berggren who then said he would not do anything about building until spring and complainant did not talk with him afterwards. In September, 1927, complainant filed his claim for a mechanic's lien against the premises but made no demand for the payment of any money until January 17, 1928, at which time he wrote stating that he would appreciate some money on account, but not stating that any definite amount was due or requesting any specific sum.

master which has been approved by a chancellor has been the subject of somewhat conflicting decisions. It seems, however, to have been settled in <u>Chechik v. Koletsky</u>, 311 Ill. 433, that the finding of a master is not to be given the same effect as the verdict of a jury in a case where the parties have the right to have the issues of fact determined by a jury, and it is stated:

"In a chancery case the facts are found by the court, and the master's report, while prima facte correct, is of an advisory nature, only. All the facts are open for the consideration, in the first instance, of the trial court, and in case of an appeal, by the reviewing court. Without regard to the finding of the master upon any particular question of fact, the ultimate and final question in this court is: Was the degree rendered by the chancellor the proper one under the law and the evidence? Corbly v. Corbly, 260 Ill. 278; Kelly v. Fahrney, 242 id. 240; Fairbury Agricultural Board v. Holly, 169 Id. 9."

In this case the master stated in his report that from his observation of the witnesses on the stand he disbelieved Berggren and Hunson and believed complainant. One reason given is that Hanson and Berggren were close friends socially. The

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evidence shows that on a few occasions they had played golf together but fails to establish that they were close friends. A more important matter is the admission by Hanson of the truth of Kallinger's testimony to the effect that when in September he, Mallinger, spoke to Manson about filing a claim for lien against defendants, Hanson suggested that he ought to take measures to protect himself. At the same time this frank admission by Hunson would indicate that he was not intentionally swearing falsely in favor of Berggren. He explains that he "was just an innocent by-stander."

Complainant and defendant are of course equally interested in the result of the suit, and the burden of proof was upon complainant to establish his case by a preponderance of the evidence.

Practically every material fact to which complainant testified is denied in detail by Berggren, who is corroborated by Hanson. Of course, the preponderance of the evidence is not alone to be determined by the number of witnesses who testified to or against a given fact, but in weighing conflicting evidence not only the number of witnesses but the probabilities of the respective narrations of the witnesses becomes persuasive. The testimony of Berggren and Hanson as to the manner in which contact with complainant was made seems more probable than the indefinite evidence on that point given by Mallinger, who was unable to remember how he first learned that Berggren, who was a stranger to him, contemplated putting up a building.

It is difficult to understand just why Mr. Berggren should have concealed from complainant the fact that he was already obligated to pay for other plans. There is no doubt that complainant solicited the business and in doing so he would naturally offer some inducements to his prospective customer. Again, it hardly

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seems reasonable to suppose that Berggren would, in addition to plans for which he was already obligated, bind himself to the additional payment of \$4,000 to \$5,000 before he had secured the lean which was a necessary preliminary if the building was to be sected, nor does it seem reasonable to suppose that complainant would have waited from January 3, 1927, to January 17, 1928, before asking for any payment on account and then fail to indicate that any particular sum was due if an unconditioned obligation was incurred by defendant.

on some matters of fact it appears the master clearly erred, as where he found the title to all four of the lots to have been in defendants at the time the contract was made, whereas defendants owned only two of the lots at that time. In computing the amount found due it seems the master accepted \$135,000 as the cost of the proposed building. Complainant's testimony was that this was the total amount of bids received by him, but he also stated that the estimated value of the proposed structure in June, 1927, was \$125,000. Assuming a liability it would seem that the computation should have been based on that sum rather than on the total amount of the bids. The report found the sum of \$4,725 less an allowance of \$400, namely, \$4,325, to be due, although complainant himself testified that the reasonable value of his services was \$4,000.

In view of the fact that the testimony of complainant, upon facts in controversy, is denied by two witnesses and that the facts as related by him are quite improbable in view of the uncontradicted facts and circumstances, it would seem that a court of review must be constrained as to the facts to hold the finding of the master against the weight of the evidence.

This court is already committed upon the question of law in a case where the complainant here was also the complainant,

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and where the facts were quite similar. In Mallinger v. Shapiro.

244 Ill. App. 228, we held, construing section 1 of the Mechanic's

hien act, an architect was not entitled to a lien under an oral

centract for services in drawing plans for a building which was

never in fact constructed. It is now urged upon us that the

opinion in that case misconstrues section 1 of the Lien act. The

case, however, was reviewed in Mallinger v. Shapiro, 329 Ill. 629,

and affirmed, although the court in its opinion held that a decision

as to the question of law was not necessary and declined to pass

upon it.

Complainant cites Standard Gil Co. v. Vanderboom, 326 Ill. 418, and Carnegie v. Tate, 245 Ill. App. 617, in addition to authorities which were cited and considered in our opinion filed in that case. We have examined these additional authorities and find nothing therein which we regard as inconsistent with the law as stated in that opinion. On the contrary, in Standard Cil Co. v. Vanderboom, there are expressions which we interpret as approving of the views expressed in Eallinger v. Shapirg.

In the absence of authority by our Supreme Court holding to the centrary, we adhere to that decision, and in conformity therewith the decree in this case will be reversed and the cause remanded with directions to dismiss the bill.

REVERSED AND REMARDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

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SEANISLAN LAKOMY.
Appreliee.
APPEAL FROM MUNICIPAL COURT
FRANK ROZAK and JOSEPHINE ROZAK.
Appellants.

MR. JUSTICE MATCHETT DELIVERED THE OPICION OF THE COURT.

On June 28, 1928, plaintiff Lakomy caused a judgment by confession for the sum of \$1070 to be entered against defendants upon their promisecry note.

On July 27th thereafter on motion by defendants supported by their affidavit an order was entered that the judgment
be opened, that leave be given defendants to defend, that a trial
be had and that the judgment stand as security. Later there was a
trial and the court found that on the date judgment was confessed
defendants were indebted on the note in the sum of \$1,070. Judgment
was entered that the former judgment of June 25th stand confirmed.
This judgment defendants seek to reverse on this appeal.

The defense set up in the allidavit of merits was stated to be:

"\*\* the said note sued upon herein is a conditional one, contingent upon certain conditions and predicated upon a certain real estate exchange contract, entered into by and between the plaintiff and the defendants, a copy of which is attached hereto, and by reference made a part hereof:"

further that at the time of the execution of the contract the note in question was placed in escrew with one Obrzut for purposes set forth in the centract; that after the execution of the contract defendants discovered that the sewer and plumbing system of the real estate contracted for was connected with the sewer system of the rear building of the adjoining let, which adjoining let was not ewned by plaintiff, and that upon discovery of that fact one of defendants talked with plaintiff about the matter and plaintiff promised upon that and other occasions that he would not hold

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MANE APPAR and John Sire house, Appellents,

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defendants to the contract; that Obrzut delivered the note to plaintiff without defendants' consent.

The parties upon the trial offered evidence tending to sustain their respective contentions, and at the close of the evidence defendants submitted propositions of law to the effect that plaintiff was not entitled to recover because he was not the legal helder of the note; that the alleged note was conditioned upon the performance on the part of plaintiff of the terms and conditions of a real estate exchange contract executed at the same time as the note: that the execution of this contract and note in question constituted one transaction; that before plaintiff could recover it was necessary that he show by a preponderance of the evidence that he had fulfilled the terms and conditions contained in the real estate exchange contract and that defendants had defaulted therein: that it was necessary, before plaintiff could recover, that he should prove that he had tendered a statutory warranty deed in accordance with the terms and conditions laid down in the contract in evidence, and that defendants refused to accept the deed and further refused to deliver the statutory warranty deed with reference to their property and in accordance with the terms and conditions of the contract; that as a matter of law there was never any delivery of the note in question by defendants to plaintiff; that the sever and plumbing system contained in the premises mentioned in the contract connected with a building on the south, which building and premises were owned by another party; that this was a material and latent defect which soculd not be ascertained at the time of the execution of the contract in question and therefore constituted a material breach of the contract, whereby defendants had a right to resoind the same.

All of these propositions were refused and a finding entered as hereinbefore set forth.

defendants to the contract; that Obraut delivered one nate to plant! Twitter defendants defendants defendants.

The parties wood the trial offered evilones termin, to wire and to solving the transfer of the course and the color dense defendants saletimed proper'ines at less the effect that in a f and lon as an esmanos tropper or beindons for any Triantele old many benefitta. Saw when therein and hadd intensely to ubbied To thoughtour ben which has to filible As to start and no communities well as and same off the holosop for the continue of the case of wass religion of the section of the location of the confidence of the land to be IT TOVOCON BENCO TELLA LO MINION DONE : ATTA BONDAMES DON BESSOLEDE in a coverage of the city by a proper termine of the extension to the he had buililied the corner and conditions contained in the real carelevent besteated in a stock mine that and forther agreemen alas that it was mechanary, helore plaints if could accover, that be subsult urate that he had beridered a cintulory warranty about he aceerdar.ca wild the terms and cendicives laid love in the contract in restant to the true to the color of the same at the same and the thirty refleced to collaver the recitions carried are recitively to want titung have a ter out this borneroons of has viraste wie wi the continue; that he marter at the thorn martiners of the note in question by defendance to picticititities the amount and planeling agreem contentned in the greation lead in the first Express converges while a bull from the each contract in the lift in and the letter we are about that the restance of lease with another - and To and and all of the constructions are the constructions and the construction of the construction o automition of the contract in occurion and thereis a nortific type a mederical broads of the equipment, where the work as the co . Bank Col halpeda

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It is noturged in behalf of defendants that the finding of the court is against the evidence upon any material fact, and there can, we think, be no dispute as to the actual facts established by the evidence.

Plaintiff and defendants on April 4, 1928, entered into a contract whereby they agreed to exchange certain parcels of real estate owned by them respectively. The contract contained the usual provisions as to title, encumbrances, prorating of taxes, etc. We cash was paid by either party, but each of the parties executed a note to the order of the other for \$1,000. The contract states:

"Both parties have executed judgment notes for \$1,000, payable to themselves in case of default for expenses." The contract provided that commission should be paid to Walter L. Obrzut and that the deed should be passed and negotiations closed at his office within five days after the deal was found good. Time was made the essence of the contract, and it was provided that the contract should be held by Obrzut for the mutual benefit of the parties.

Er. Rosak testifies that when he discovered the condition of the sewage and plumbing system he told plaintiff thereof and that plaintiff said to nim that he would not enforce the contract against his wishes. Plaintiff denies that Er. Rosak ever spoke to him about the sewer, and he together with Obraut and Leleko, who worked in Obraut's office, testified that both defendants said that they were not going through with the deal but that nothing was said by either of them about the sewer. Obraut says that Rosak effered to pay him a certain amount if he would break the deal.

Evidence was also given in behalf of the plaintiff by Mr. Pinciak, a plumber, who testified that a former connection of the sewer of plaintiff's premises with the adjoining let had in fact been disconnected.

If the trial court believed the evidence introduced by plaintiff, it is apparent that the propositions of law submitted were

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eg (14. ) o we si vota biles vita e venined frico infra ents (i ex. o horszanden z. I to entra licentra, en hodz america e bi if "Ytishinia not applicable to the facts of the case, and if the trial court found the facts according to this evidence as submitted in behalf of plaintiff, we cannot say that the finding is against the weight of the evidence. Propositions of law, therefore, urged in defendants' brief as to the necessity of a vendor furnishing an abstract of title and to the effect that the vendee could not be placed in default until an abstract was furnished, would not be applicable to a case where the vendee without just cause repudiated his obligations under the contract. The law would not require a needless formality. Lyman v. Gedney, 114 Ill. 388; Osgood v. Skinner, 211 Ill. 229. This is a complete answer to the argument of defendants that there is no evidence tending to show that plaintiff complied with the conditions and terms of the contract.

It is also urged that there was no delivery of the note, but the question of the delivery of a note, as in the delivery of a deed, is a question of what the intention of the parties was, and in view of the fact that no money was paid by either party at the time of the execution of the centract, and considering the language used in the contract with reference to the notes, we think an intention to deliver the same may be inferred from the evidence.

Main v. Pratt, 276 Ill. 218; Struve v. Takee, 285 Ill. 103.

It is also urged in behalf of defendants that the note was in the nature of a forfeit or penalty for failure to comply with the contract and that the amount of recovery should therefore have been limited to damages actually sustained and proved, if any.

There was evidence tending to show that the usual and customary rate for commissions to a broker of three per cent would amount to \$900; on that item alone damages could not be less than \$900. Assuming that the note is in the nature of a penalty, we do not think the amount of the judgment can be considered excessive under the circumstances. Gobble v. Linder, 76 Ill. 157; Burk v.

not applicable to the facts of the case, and if the trial court found the facts accordingto this evidence as submitted in behalf of plaintiff, we cannot say that the fining is against the voight in evidence. Fropositions of law, therefore, urged in defendants brief as to the necessity of a vender furniahing an abstract of title and to the effect that the vendes could not be placed in default until an abstract was farmialed, vould not be applicable to asse where the vendes without just cause repudiated his obligations under the centract. The law would not require a needless farmality. Lyans v. Gedney, lid iil. 386; Canad v. Skinney. 211 farmality. Lyans v. Gedney, lid iil. 386; Canad v. Skinney. 211 that there is a complete answer to the argument of defendants that there is no evidence tending to show that plaintiff complete with the conditions and terms of the canow that plaintiff complete

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Denn, 55 Ill. App. 25; Gibb v. Merrill, 234 Ill. App. 267.

We think the evidence clearly shows that defendants defaulted in the performance of their contract without any cause whatsoever, and that the judgment against them for the amount of the note is just. The judgment is therefore affirmed.

AFFIRMED.

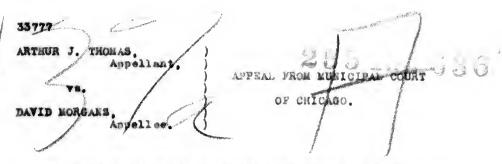
McSurely, P. J., and O'Conner, J., concur.

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We think the swittense ciently eners that defendants defendants defendants defendants defendants the interest of white of the same and the same of the note is fine. The july same is the same of the note is fine.

AFFIREN.

Machany, v. J., and O'Contor, J., concur.



MR. JUNTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

On April 24, 1929, plaintiff, Arthur J. Thomas, confessed judgment against defendant, David Morgans, on a premissory note. Upon metion of defendant, supported by his verified petition, the judgment was opened and defendant had leave to defend. Thereefter, upon trial by the court, there was a finding for defendant and judgment thereon, which plaintiff asks us to reverse.

Thomas, a brother of plaintiff, by whom it was endorsed. The defense interposed is that the consideration for the note was real estate commissions claimed to have been earned by Jason A. Thomas on account of the sale of thirty lots in the city of Chicago owned by Morgans to one George Sawiak; that at the time of the sale Jason A. Thomas orally agreed with defendant Morgans that no commission would be due until the respective pieces of real estate should have been paid for by the purchaser; that Jason Thomas agreed not to negotiate the note but to hold it as guaranty of the payment of commissions when the same should become due; that said note should not go into effect as a note until the purchaser had fully paid the purchase money, and that when said money was fully paid the said note should take effect as a delivered instrument.

The affidavit of merits further alleged that at the time Jason A. Thomas obtained possession of the note sued on, another note in the sum of \$550 was given by defendant upon the same terms and conditions.

It was also averred that four of the lots had been paid

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for and that defendant had paid the commission on these lots in the sum of \$300 which was applied on the note for \$550 in accordance with his agreement; that no other of the lots had been fully paid for and there was therefore no other sum due as commission on said note.

Defendant further averred that plaintiff took the note with full knowledge of the agreement between defendant and Jason A. Themas; that plaintiff was not a holder of the note in due course; that he paid no consideration therefor and simply held the same for the benefit of the payer; that at the time he produced the purchaser for the real estate, Jason A. Themas held no license as a real estate broker or malesman and for that reason could not recover.

Defendant upon trial assumed the burden of establishing his defense and called plaintiff as a witness under section 33 of the Municipal Court act, and the parties offered other evidence tending to sustain their respective contentions.

Plaintist urges that he is a holder in due course. The evidence shows without contradiction that the note was transferred by Jason A. Thomas before maturity, but a consideration of all the evidence leaves us unconvinced that plaintist took the same in good faith and for a valuable consideration. Plaintist is the brother of Jason A. Thomas, and the alleged consideration for the note was money advanced by plaintist to their parents. It does not appear that the parents needed such assistance, and we have some doubt as to whether it was ever in fact given. The finding of the court is entitled to the same weight as the verdict of a jury, and we do not think we can say that the finding of the court on this issue is against the manifest weight of the evidence.

Jason A. Thomas was not a licensed broker, and on the authority of <u>Hendricks v. Richardson</u>, 233 Ill. App. 130, defendant contends he cannot recover. However, it is uncontradicted that

for and that defendant had paid the occasions on these loss in the sum of \$300 is accordance when his expense; that no other of the lote had been fair; paid for and there was therefore as other sum due as commission on cots note.

Befundant further nevered that plaintly took the note with full knowledge of the extensity that laid knowledge of the extension and layer at the note that plaintly were not a belief of the note in day course; that he said no consideration therefor and simply held the same for the benefit of the payer; that at the time he precured the purchaser for the real attaches at the real course and attaches or the real actace.

Defentant upon tried earners the burden of establishing his defense and called picintial as a witness under easies he of the hunderpal Court act, and the perties offered other evidence tending to suctain their respective committees.

Plaintiff urges that the accident to the collect in due ourse. The sylence shows without contradiction that the rote was transferred by factor A. Thomse health and thirty, but a consideration of the line oridence leaves us unconvinced that praintiff took the case in good faith and for a valuable const. Aration. Aluterial is the brother of faith and for a valuable const. Aration. Aluterial is the note was short that of the manne, and the cheeked considered to the note was that the parents needed and and presents. It does not agreem that the parents needed and another or the limits as whether it was ever in fact and are the faith as authorised to the same weight or the reaction will be accepted to the same weight or the wardies the shirt of the same weight of the entire of the sentence in

Jeson A. Thoman was not a licensed broner, and on the authority of Hendricks v. Adapanison. 233 711. App. 1 W. del'er lant centered he cannot recover. Herever, it is uncontradicted that

Jason A. Thomas was not engaged in the business of selling real estate, and it appears from the evidence that he negotiated only this one transaction. The statute which requires a certificate of registration issued by the Department of Education and Registration (Cahill's Ill. Stat., chap. 17-A) is therefore not applicable.

Killen v. Irmiter, 233 Ill. App. 116; O'Eeill v. Sinclair, 153 Ill. 525.

There remains for consideration the question of whether plaintiff is entitled to recover on the merits as disclosed by the record, conceding that he is not a holder in due course. Here again there is little conflict in the evidence as to the material facts.

Defendant owned real estate he wished to sall, and he was introduced to Jason A. Thomas by a Mr. Morris, who brought Jason Thomas to defendant's home about September 1, 1928. From that date defendant saw Morris and Jason Thomas from time to time until the deal was finally closed on October 20, 1928. It is not denied that Jason Thomas procured the customer, George Sawiak, to whom defendant conveyed the property by warranty deed, dated October 31, 1928. After the deal was closed defendant executed and delivered to Jason Thomas the note upon which this suit was brought. It is dated October 20, 1928, by its terms is due 180 days after date with interest at 6 per cent per annum until paid, and is for the sum of \$1700. At the same time defendant executed and delivered to Jason A. Thomas another note for the sum of \$550, which was likewise for commissions. The lots were 30 in number and the purchase price was \$1500 each. These notes therefore represented a commission of 5 per cent on the transaction.

Defendant testified that he told Jason A. Thomas that he did not like the idea of the deal at all and further:

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note on this condition, you make me note to that effect that it won't be due until I get my money, and he said, 'All right.' He sat down and he asked Morris, 'How will I word this?'"

## He further testified:

"He said that that note was all right, that they were to meet that day and if Sawiak hadn't taken up the lote it would be right, they could be renewed; and I took him at his word, otherwise I would not have signed."

This eral evidence as to what was said at the time of the execution of the note was objected to by plaintiff, but his objection was overruled.

It further appears that after the transfer of the note to Arthur J. Thomas, plaintiff, he wrote defendant on April 4th stating that he held the note and that it would fall due on April 6, 1929, and asked defendant to make arrangements "to honor the same by neon of that date." Defendant says that when he received that letter he called Jason Thomas up and that Horris and Jason Thomas came to his home and they went over the whole thing; that he told them that he thought the deal didn't look right because Morris owed him some money, but that Thomas said that he could do nothing and that he had sold the note to another.

On April 12, 1929, Jason A. Thomas wrote defendant a letter in which he said:

"Referring to our interview waw I hereby agree that should you have to repessess any portion of said property on account of nonpayment of same by said George Sawiak. I will refund to you from the commission which shall be paid me the sum of \$65.00 for each lot remaining unpaid by the said George Sawiak and repossessed by you."

Defendant further testified that he did not know how many lots had been paid for; that according to the contract he was to receive the money when the building was under roof on each lot, and that he thought somewhere around 11 were then under roof; that lately he had not received the money because it was being paid to the Pioneer bank and not to him.

Jason A. Thomas testified that he had a conversation

note on this condition, you make me note to that eithet that it you't be due until I get my money, and he said, 'all right.' He sat down and he asked herrie, 'Hew will I word this!"

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with defendant about the 8th or 10th of April, 1929, when Er.

Norris was present; that defendant said he would not meet the note at that time but would not object to meeting it after one-third of the buildings were up, and that he agreed to pay the entire note when ten lots were built on; that the buildings were to be considered built when the roofs were on, and that eleven at that time were under roof.

This testimony is not denied by defendant and therefore stands uncontradicted in the record.

Defendant contends on the authority of Bell v. Me-Donald, 308 Ill. 329; Foncannon v. Lewis, 327 Ill. 455; Owens v. Ragle, 334 Ill. 97, and Traders Investment Co. v. Kalas, 246 Ill. App. 511, that the oral evidence offered and received over objection was admissible to disprove the validity of the note. These cases construe section 55 of the Regotiable Instruments act, which provides in substance that the title of a person who negotiates an instrument is defective within the meaning of the act, when he obtains the instrument or any signature thereto by fraud, duress or force and fear, or any other unlawful means, or for an illegal conelderation, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud. Smith-Hurd's Ill. Rev. Stat. 1929, chap. 98, p. 1956. These cases in effect hold that parel evidence is admissible in order to show that the delivery of the note was purely conditional or was secured by means of fraud. and it is held in these cases that parol evidence does not under such circumstances contradict the terms of the writing or vary its legal import, but, on the contrary, tends to show that it was never delivered as a present contract. The distinction is pointed out in Handley v. Drum. 237 Ill. App. 587, and E.C. Killing Co. v. Sloan. 232 Ill. App. 266, a case construing a non-negotiable contract. Traders Investment Co. v. Kalas, 246 Ill. App. 511, and also other

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cases on which defendant relies are distinguishable upon this ground.

In evidence here tends to show not a conditional but an unconditional delivery of the note. The evidence of defendant as to oral conversations before the execution of the notes tends to prove only a contemporaneous agreement attaching a condition as to the time when payment of the note should be made. This would vary the terms of the note. That such evidence is not admissible is established by authorities too numerous to require discussion in detail. Shinner v. Raschke, 213 Ill. App. 324; Beattie v. Browne, 64 Ill. 360; Johnson v. Glover, 121 Ill. 283. If this evidence is excluded (as it should have been) an overwhelming preponderance of the evidence establishes the right of plaintiff to recover.

For the reasons indicated the judgment is reversed with a finding of facts and judgment here for the amount of the note with interest at 6 per cent from date, amounting to in favor of the plaintiff appellant, Arthur J. Thomas, and against the defendant appellee, David Morgans.

REVERSED WITH A FIADLEG OF FACTS AND JUDGEERT HERE FOR

McSurely, P. J., and O'Conner, J., concur.

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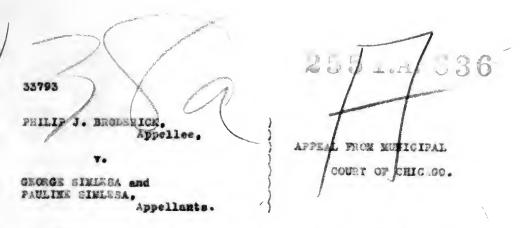
RAVERSED II. . . IIIDEN DE TROTO AND NUCALIT HAROLFAR

Recurring, P. J., and Channer, T., concur,

The court finds as facts that at Chicago, Illinois. on October 20, 1928, defendant, David Morgans, made, executed and delivered his promissory note for the sum of \$1700 due 180 days after date, for value received, to the order of Jason A. Themas, with interest at six per cent per annum after date until paid: that said note was thereafter before maturity duly assigned by an endorsement on the back thereof in writing by said Jason A. Thomas to plaintiff, Arthur J. Thomas, who is now the owner and holder thereof; that there is due and unpaid upon said note the sum of \$1700, together with interest at the rate of six per cent per annum from October 20, 1928, to January 27, 1930, amounting to the further sum of \$129.48, and making a total sum due from defendant and appellee, David Morgans, to plaintiff and appellant, Arthur J. Thomas, of \$1829.48, for which said sum the said Arthur J. Thomas is entitled to judgment against said David Morgans.

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and the sourt finds as facts that at thioses, lilinois, on Cotober 20, 1928, defendant, David Morgans, made, executed and delivered his promissory note for the sum of \$1700 due 150 chara after date, for value received, to the order of lauen A. Little of ab toric manage tou tone one xia ta tactotal dile . named pold; that said mete was thereafter before maturity duly easigned by an enderzement on the back therest in writing by said inton A. Thomas to plaintiff, Arthur J. Thomas, who is now the center and holder thereof; that there is due and aspald upon said note the ince med als lo east ent in terrest at the rensent, GOVIE le men. Ther stand from Catcher 20, 1922, to Jamery 27, 1930, smounting more and mus lates a harden bus to the la mus restrict and et .. " defendant and appelles, David Forgans, to plaintiff and apspallone, Arthur J. Thomas, of \$1629.48, for which said ours the ent d Arthur J. Thomas to entitled to judgment advince rolf David Borgana.



MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff Broderick brought suit against defendants, George and Pauline Simlesa, in forcible detainer to secure possession of certain premises in the city of Chicago. There was a trial by the court and a finding for plaintiff and judgment against defendants. Motions for a new trial and in arrest were overruled, and defendants by this appeal seek to reverse the judgment.

The evidence, most of which is documentary in character, discloses little, if any, conflict.

the owner of these premises. On that date, she entered into articles of agreement in writing and under seal with defendants, whereby it was provided that if defendants would first make the payments and perform the covenants mentioned therein, she, as party of the first part, covenanted and agreed to convey to them the premises by warranty deed. The purchase price was \$9,000. The agreement recites that \$1500 was paid; that the premises were subject to a first mortgage of \$3500, due in about five years, which defendants agreed to assume and pay; that they further agreed to pay the balance of \$4,000 in installments of \$50 or more on July 18, 1926, and the same amount on the 18th day of each and every month thereafter until the same was fully paid, with interest at 6% per amum, payable monthly, on the whole sum remaining from time to

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taxes and assessments subsequent to the year 1925; that in case of the failure of defendants to make either of the payments, or any part thereof, or perform any of the covenants on their part, the agreement should, at the option of the party of the first part, be forfeited and determined, and defendants should forfeit all payments made by them; that such payments should be retained by the party of the first part in full satisfaction and liquidation of all damages sustained by her and that she should have the right to reenter and take possession of the premises.

Following the last clause is a typewritten statement on the face of the contract in these words "Sixty (60) Days' notice in writing." The contract also provides that the time of payment should be of the essence of the contract.

By a writing on the back thereof, Jane EcManus assigned and transferred all her right, title and interest to plaintiff and on April 3, 1929, Jane McManus by a quit-claim deed conveyed and quit-claimed the premises to plaintiff and the deed was duly acknowledged, delivered and recorded.

The contract between Jane McManus and defendents made on June 18, 1926, was placed with a real estate broker, Patrick J. Grady, at the time of its execution in order that he might receive the payments to be made thereon. Payments were made from time to time to him by defendants, and as the payments were made they were noted in appropriate blanks on the back of the contract. The last payment was made on February 18, 1929, and defendants made no payments whatever thereafter.

On May 23, 1929, plaintiff served notice on defendants that he had elected to declare the agreement forfeited and determined and demanded immediate possession of the premises.

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The broker had at his office a warranty deed from Jane McManus, bearing date of September 19, 1928, in and by which she purported to convey these premises to defendants. It was the intention that upon the necessary payments being made this warranty deed should be delivered to defendants and that they at the name time would execute and deliver a note for the balance due, amounting to \$2,422, secured by a trust deed upon the real estate. This warranty deed, trust deed and notes had been drawn up for the purpose of carrying out this arrangement. The trust deed and note were never executed, but the deed from Jane McManus to defendants was through error of an employee in the broker's office filed for record in the office of the recorder of Cook county and recorded September 27, 1928. Repeated demands were made by the broker after February 18, 1929, for payments under the terms of the written agreement, but Pauline Simless told the broker that she and her hasband had no money and were unable to continue the payments.

On Harch 8, 1929, defendants made a deed purporting to convey this real estate to the mother and father of Hrs. Simlesa, but upon a threat from the broker that they might be put in jail for so doing, another deed was me e conveying the property back to defendants.

The facts as above stated are, we believe, uncontradicted in the record.

Defendants contend in this court, in the first place, that the Eunicipal court of Chicago was without jurisdiction to try questions of title in this proceeding, citing Hooper v. Buvidas, 239 Ill. App. 596, and numerous other authorities cited in that opinion. There is no question about that rule. The issue in an action of this kind is always the right to possession, but it does not follow that deeds which might tend to establish or disprove title are therefore inadmissible. There was and could be no

The broker had it his office a . r. asty deet from J. L. Lowence, be arts of epicaber lo, 1828. in ad by alas age parported to convey them are to defend ata. It was the The case and then waiss admirply promise ball and salesses an e bui in this a di on a daien caien to the ting of binade back time avale excepte and deliver a nets for the balance doe, amounting to \$2,422, secured by a trust deed upon the real cotate. This vertacty deed, trust cood and motor been been aver a up for the purpose of cerrying out this arrangement. Int isset for the eare mean an abset, but the deed from deed fold in a series sas through error of an employes in the broker's of the filed for recurd in the effice of the recenter of local causty and recorded September 27. 1923. hape-ted committe wate wall by the brown a feer Pobruary 18, 1929, for payments us or the terms of the artices agr ccost, but Paulius imiese teld the brober to t are and her t shows server a wis comise, of vicame ever bee remes on bed

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question tried out in this proceeding as to the title. The deeds would have been material had an action been brought which put the title in issue. They were also material and proper evidence as tending to establish or disprove the right of possession.

Defendants next contend that the evidence fails to prove that plaintiff was ever in possession of the premises and that he cannot maintain an action of forcible detainer for that reason.

Defendants cite Thompson v. Bornberger, 59 Ill. 326, a decision in which a former Forcible Entry and Betainer Act is construed, and Whitchill v. Cooke, 140 Ill. App. 520, a decision, construing the present statute, which follows that case.

Was a proceeding under the first and second clauses of section 2 of the Forcible Entry and Detainer act (see Smith-Hurd's Ill. Rev. Stat. 1929, chap. 57, p. 1537, sec. 2), while this proceeding is brought under the fifth clause of said section 2, which in substance provides that when a vendee has obtained possession under a written or verbal agreement to purchase lands or tenements and has failed to comply with his agreement and withholds possession of the premises after demand in writing by the person entitled to possession, the action may be brought. In a similar proceeding, where, as here, there was an assignment of the contract for purchase together with the execution and delivery of a deed, we held this evidence sufficient to show possession. Stevens v. Yeyer, 169 Ill. App. 469. Moreover, it would appear that defendants are estopped to interpose this defense. Lesher v. Sherwin, 86 Ill. 420.

Defendants next contend that the judgment cannot stand because the notice was insufficient. They say that the articles of agreement provided that in case of default sixty days notice in writing of the intention to declare a forfeiture should be given and that this provision was not complied with but instead demand for

an sion tries out in this proceeding a to the tille. The work round have been entertal but an rotten be a brown! him the part of the first in land. They were also material and proper closes a tending to restable or lisprove the right of posse sion.

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immediate possession was served upon defendants eight days before the suit was begum.

As already stated, there appears in the body of the contract in an appropriate blank the typewritten clause, "Sixty (60) days notice in writing," but it is scarcely possible to determine to what matter in the contract this clause refers. It does not state who is to give the notice nor to whom the notice is to be given, nor concerning what matter it is to be given. Indeed, the meaning of the clause seems to be so uncertain that it is impossible to give effect to it. If, however, it is assumed that this clause requires sixty days notice before forfeiting the contract or reentering, it would seem that defendants by their wrongful conveyance of the title waived any such supposed right under the contract.

\*\*Moreover\*, under the terms of the contract, upon default of defendants plaintiff had a right to possession whether he did or did not elect to forfeit the contract.

Defendants say that forfeitures are not regarded with special favor by the courts, and this is very true as was pointed out in United Electric Coal Co. v. Keefer Coal Co., 249 Ill. App. 222, a case on which defendants rely. The uncontradicted evidence in this case, however, shows that defendants have not been harshly treated; that they were repeatedly requested to make payments which were due, which they declined to make, and thet taking an unconscionable advantage of the mistake which resulted in the recording of an undelivered deed to them they attempted to deprive plaintiff of all his rights in and to the premises. Defendants, however, disclaim any intention to forfeit the contract in this proceeding and say that question is left for determination of a court of equity. The judgment of the trial court is in every respect just and it is affirmed.

McSurely, P. J., and O'Connor, J., concur.

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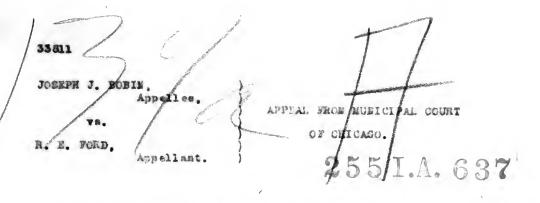
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Medurely, P. J., and O'Connor, J., concur.



MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Bobin sued Ford to recover for damage to his automobile sustained in a collision with defendant's automobile on January 22, 1926, at the intersection of Montrose and Hermitage avenues. Chicago.

Plaintiff alleged that he was at the time of the collision exercising due care and that the negligence of defendant was the cause of the accident.

Defendant in his amended affidavit of merits averred that plaintiff was at fault and denied that he was in any respect negligent. Defendant further averred that at the time in question he was not operating his automobile, nor present, but that the driver of it was using it solely for his own pleasure and not for any use of defendant.

Judgment was entered for plaintiff on the finding of the court for \$141.50. Plaintiff has not appeared in this court to support the judgment.

The accident occurred about 1:30 o'clock in the morning. Plaintiff was on his way home, driving west on Nontrose avenue. The driver of defendant's car, a brother of defendant, was driving south on Hermitage avenue. Upon cross-examination plaintiff was shown a written statement signed by him purporting to describe the accident, and in response to questions he stated:

"If that statement says that shen the front part of my car was about in line with the east curb of Hermitage the other car

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was about on a line with the north curb of Montrose, I will not deny the statement."

The driver of defendant's car on cross-examination testified:

"As I approached Eentrose and looked to my left, I did not see any car coming. I looked to my right, and saw no car coming. I then proceeded to cross the intersection, and did not again look to my left until the young lady halloed."

This witness further testified:

"I did not own that car; it was my brother's car. I was not operating it on his business; it was a pleasure trip. My brother knew I took the car; I had the keys to it; I always have taken it."

The preponderance of the evidence therefore indicates that as these two cars approached the intersection and reached the intersection at about the same time, defendant had the right of way and plaintiff must be held to have been negligent. Partridge v. Eberetein, 225 Ill. App. 209; Fisher v. Johnson, 238 Ill. App. 25; Piper & Co. v. Yellow Cab Co., 246 Ill. App. 487; Johnson v. Duke, 247 Ill. App. 372; Heidler Lumber Co. v. Wilson & Bennett Co., 243 Ill. App. 89.

Ference, on the uncontradicted evidence we think defendant was not liable for the reason that his automobile was not being operated for his uses, purposes or business. Arkin v. Page.

287 Ill. 420; Reinick v. Smetana, 205 Ill. App. 321; Graham v. Page.

220 Ill. App. 431; Freeman v. Dixon, 233 Ill. App. 196; Scott v.

Greene, 242 Ill. App. 405.

For the reasons indicated the judgment is reversed with a finding of facts and judgment here for defendant.

REVERSED WITH FIEDING OF FACTS AND JUDGERAT HERE FOR DEFENDANT.

ReSurely, P. J., and O'Connor, J., concur.

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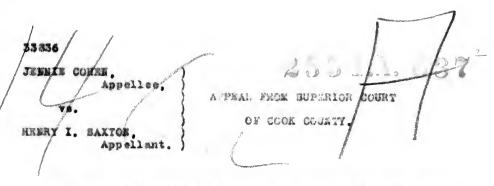
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We find as facts that at the time of the collision in question the driver of defendant's automobile had the right of way at the crossing where the collision occurred and was not guilty of negligence preximately tending to bring about the collision; further, that the automobile owned by defendant was by his permission being driven by a brother of defendant for this brother's own pleasure and not for defendant's use nor for his business nor by his direction; that defendant is therefore not liable to plaintiff; that the negligence which caused the damage to plaintiff's automobile was not the negligence of defendant but the negligence of plaintiff, and that judgment should be entered on this finding in this court in favor of defendant and against plaintiff.

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AR. JUSTICE MATCHETT BALIVERED THE OPINION OF THE COURT.

On June 11, 1929, Jennie Cohen brought suit against
Henry I. Sexton in the Superior court. She filed a declaration of
two counts in which she averred that an automobile in which she was
riding collided on a public highway with an automobile driven by
defendant; that the collision was caused by defendant's negligence
and that she thereby received personal injuries. One of the counts
charged malice generally, without averring any facts from which such
malice might be inferred. She claimed damages in the sum of \$25,000.

On the same day plaintiff filed her petition in the action at law, setting up that she had begun suit; that her claim was for unliquidated damages in the sum of \$25,000; that defendant was not a resident of Cook county in this state but that he was a resident of New Orleans in the state of Louisana; that while now temporarily within Cook county, he would speedily leave the state and was about to leave the state, taking his property with him. She prayed that a writ of ne exeat issue.

Thereupon Judge Lewis of the Superior court entered an order directing that the <u>ne exeat</u> writ issue, returnable to the next term of court, upon petitioner's filing a bend in the sum of \$1,000 and that the clerk endorse upon the writ that defendant be required to give bail in the sum of \$5,000.

The writ then issued and was duly executed by the sheriff arresting Saxton, who failing to give bond was committed to jail. On June 13th by order of court the bail was reduced to \$4,000 and Saxton was released upon giving cash bail.

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On June 27th thereafter an order was entered denying motions by Saxton to vacate the order of June 11th and to reconsider the action of the court theretofore made 1: denying the motion to set aside, and from that order this appeal has been perfected.

Motion in behalf of Jennie Cohen has been made in this court to dismiss the appeal, and that motion has been reserved to the hearing.

the motion that there is a discrepancy in the order appealed from and the recital of the bond given, and it is therefore urged upon the authority of <u>Curry v. Rinman</u>, 8 Ill. 90, that the appeal should be dismissed. The order which appears in the common law record is somewhat indefinite but it is fully explained by recitals in the bill of exceptions. However, plaintiff contends, on the authority of <u>Vest Chicago</u> St. R. S. Co. v. Scanlan, 68 Ill. App. 626 (affirmed in 168 Ill. 34); and <u>Eat'l Commission Co. v. Lane</u>, 97 Ill. App. 418, that we have no right to consider the bill of exceptions with relation to the allowance and perfection of the appeal.

In West Chicage St. R. R. Co. v. Spanian, the court denied a motion to dismiss made upon the ground that it was not shown in the bill of exceptions that the appeal was prayed for and allowed, and, in the course of the opinion, stated that the proper place for the prayer and allowance of the appeal was in the common law record of the case and not in the bill of exceptions.

However, that case does not hold, and the cases cited do not hold, that the construction of the order alleving an appeal may not be aided by facts made to appear in the bill of exceptions. The motion to dismiss cannot provail on this ground.

As to the second contention, it is well established by the authorities that in the absence of a statute expressly authorizing. It, as interlocutory order is not appealable. The On June 19th thereafter an artar san entered danging motions by Saxton to vacate the order of June lith and to recommiss the action of the action of the action that saids are the said from that order this appeal has been norrected.

Motion in beneal of Jenuis bear has been wide in this court is dismiss the appeal and that making has been reserved to the bearing.

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right to appeal is purely statutory (People v. Andrus, 296 III. 56), and generally in the absence of a special statute only final orders are reviewable upon appeal. (Kircher v. Hemill, 239 III. App. 496.)

Thus an order overruling a denurrer of defendant to a bill which shows that defendant elected to stand by his desurrer is not appealable. Eiller v. Bunn, 336 III. 203, and cases there cited.

order in a cause; on the contrary, it is any order or decree which finally determines and adjudicates the rights of the parties.

People v. Ill. State Bank, 312 Ill. 615, and cases there cited. Defendant had the right at any time to move that the writ be quashed or set aside. (Ziamar v. Thumpson, 286 Ill. 525), and the denial of his motion in that respect finally determined the rights of the parties on that issue.

The motion to dismiss will be denied.

Defendant contends that the writ should have been quashed and set saids, first, because it was issued by a court of law, while jurisdiction to issue the same is vested only in courts of chancery, and, secondly, because the writ may be issued only in aid of liquidated as distinguished from unliquidated claims, while this claim was concededly unliquidated.

A consideration of these questions involves the construction of chapter 97 of the Illinois Statute entitled, "An Act to review the law in relation to ne skeat, approved Earch 12, 1874, (Smith-Hurd's Ill. Rev. Stat. 1929, pp. 1944-5.) It must be conceded that except as modified by this statute, the rules of law, as previously applied in England, are applicable in cases of this character. Cable v. Alvord, 27 Ohio St. 654; McDonough v. Gaynor, 18 R. J. Eq. 249; Rice v. Hale, 59 Mass. 238.

The authorities seem to agree that the writ originally was a high prerogative writ issued only at the command of the severeign for state reasons, but in the reign of Elizabeth the writ

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was diverted to the aid of chancery and the administration of remedial justice. Cyc. Pleading & Practice, vol. 14, pp. 313-28.

Courts of chancery seem to have had exclusive jurisdiction to issue the writ and then only in aid of an equitable debt, in fact due and cortain in amount.

Plaintiff centends that the Illinois statute gives
to courts of law jurisdiction to issue this writ. It may not be
denied that the stabute has materially changed the Ansient law and
practice. The writ here issued from a court of law, and the first
question for our determination is whether jurisdiction so to do is
vested in that court. Plaintiff cites <u>lewark v. Dodd.</u> 208 Ill. 60,
The opinion in that case does not refer to this statute. The proceeding there was one to donstrue a will. It was urged against the
final decree that no issue of law was properly made up, and in overruling that contention the court in effect said that under our system
where the same judge exercises both common law and chancery jurisdiction in the same court at the same time, it had become unnecessary in procedural matters to follow some of the rules which existed at the time when a different system prevailed. That case is
not analogous to this.

Plaintiff also cites 10 Ruling Case Law, 1347, where that authority states:

The rule requiring the debt to be due has been changed by statutes authorizing the courts to grant the writ in a case where the debt or demand is not absolutely due, but exists fairly and bona fide in expectancy at the time of making the application. It is obvious that these acts have overturned and superseded the whole destrine of the English law upon this subject, and made the crit of me exest applicable to all sorts of liabilities - due or undue - certain or otherwise - if they, bong fide, exist in empectancy at the time the writ is applied for.

McGee v. McGee, 8 Ga. 205, is cited by the author, but the proceeding there was by a bill in chancery and the writ was granted prior to a decree for alimony in aid of the wife's right to support. The Supreme court of Georgia, recognizing that the ancient rule was

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otherwise but construing a statute somewhat similar to ours, affirmed the judgment of the trial court. Hampton v. Pool, 28 Ga.
514, is also cited, but an examination discloses that the proceeding
there also was by a bill in chancery, in which complainent sought
to recover purchase monies paid by him for land from which he had
been evicted by paramount title. The proceeding involved an accounting. The bill prayed a writ ne exeat. Whether it was issued
is not stated. A decree for complainant was reversed on appeal.

Plaintiff also cites Lugas v. Mickman, 2 Stew. Ala. 111, 19 Am. Dec. 44. In that case Lucas filed a bill in equity against Hickman for a writ of ne exeat, setting up that he had a suit at law pending against Mickman upon a promissory note; that Hickman was about to remove from the state and sell a greater portion of his real estate, and that unless he, Lucas, obtained a writ of ne exest he would not be able to enforce any judgment recovered. The writ was granted in vacation but in term time his bill was dismissed with costs, and Lucas appealed. The court said that where the action was purely legal, as ancillary to an action at law, equity would not generally interfere, but that in cases where the courts of law and equity have concurrent jurisdiction and the defendant had not been held to bail in the action at law, the writ would be granted, and cited Porter v. Spencer, 2 John. Ch. 169, an action for account at law where the chancellor with hesitation granted the writ.

The opinion in <u>Lugas v. Nickman</u> enumerates the cases in which the writ would be granted as follows: (1) where the defendant was about to remove beyond the jurisdiction and the demand was exclusively of an equitable nature, whether a sum certain was due or not; (2) where the courts of law and equity have concurrent jurisdiction and the defendant was about to remove and had not been held to bail in the action at law; (3) where the two courts have

otherwise hat annerving a sount granul single a serie, atfire of the judgment of the trial ours. <u>Managen v. 1971</u>, or an.
514, is also often, but an event of a decreto that the prothere when was by a bir in characty, in which convincement and anto roce or purposes of the in characty, in which convincement and anto roce or purposes of the in the convincement of the first process of the convincement of the convincement of the convincement.

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concurrent jurisdiction and no action had been commenced at law but suit had been instituted in equity; (4) where from the extreme necessity of the case and to prevent a failure of justice it became necessary. The court, however, stated:

"But this fourth proposition, though it seems to be sanctioned by authority. I have some hesitation in admitting to be law. Extreme necessity, and to prevent a failure of justice, appears to me to open a door too wide, even for the Chancellor's discretion, and which in many instances may be liable to abuse."

These cases are very far from authorities for the proposition that a court of law may issue a writ of ne exeat in aid of an action at law. The action here is one purely at law in tort for negligence. It can hardly be contended that a court of chancery would have concurrent jurisdiction with a court of law in such a case.

A consideration of the language in the act also precludes the construction of it for which plaintiff contends. The first section provides in substance that the writ may issue, as well in cases where the debt or demand is not actually due but exists fairly and bona fide in expectancy at the time of making application, as in cases where the demand is due, and that it shall not be necessary, to authorise the granting of such writ, that the applicant show that his "debt or demand" is purely of an equitable character and cognizable only before a court of equity.

change the ancient rule and grant jurisdiction to the law courts to issue this writ, it seems strange indeed that the legislature did not say so. It did not say so, but on the contrary in the different sections of the act referring to procedure uses language which indicates an intention that the power to issue the writ should bemain exclusively in the chancery court. Section 4, for instance, provides that when no judge authorized to issue the writ is present in the county, or is incapacitated, or unable to act, a master in chancery

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may order the writ to issue. Section 5 provides: "No writ of ne exent shall be granted but upon bill or netition filed."

Section 8 provides: "The writ of ne exeat shall contain a summons for the defendant to appear in the proper court, and enswer the petition or bill."

Section 10 provides that upon the return of the writ duly served, "the court shall proceed therein as in other cases in chancery.\*\*\*."

It would appear that if it was the intention of the legislature to grant jurisdiction to the law courts, the language used was well designed to conceal such intention. We hold the jurisdiction to issue the writ of ne exeat under this statute is vested solely in the courts of chancery.

we think, too, that this statute cannot be construed as granting to the court power to issue the writ in support of a purely legal claim for unliquidated damages in an action of tort for negligence, such as it appears was brought in this case. The case in aid of which the statute states the writ may issue is one for a "debt or demand." The debt or demand done not necessarily have to be due, but it must exist fairly and bons fide in expectancy at the time of making the application. It does not have to be a debt or demand which is purely of an equitable character, such as, for example, a demand for alimony, and it does not have to be a demand that is cognizable only in a court of equity; that is, it may for example be a demand for account in which courts of equity and courts of law would have concurrent jurisdiction. A claim in tort for negligence is neither a debt or a demand within the meaning of this statute. It cannot be said to be "actually due."

The authorities already cited sustain the view that the statute should be strictly construed, and it would seem that the maxim, "Expressio unius exclusio alterius" is applicable. People v.

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City of Chicago, 261 Ill. 16; Sharp v. Sharp, 333 Ill. 267. Applying that rule of construction, we hold that the statute does not authorize a court to issue the writ of ne exeat in aid of an action at law in tert for negligence.

Plaintiff also contends, citing Hill v. Harding, 93 Ill. 77; Sharpe v. Korgan & Co., 144 Ill. 382; Hughes v. Foreman. 78 Ill. App. 460, and Zimmer v. Thompson, 211 Ill. App. 481, that defendant waived his right to appeal by entering into the ne exect bond and that the writ thereby became functus officio. With the exception of Ziemer v. Thompson, all these cases involve a state of facts where defendants in attachment suits voluntarily gave bonds to secure a release of the property attached. The Zimmer case held in substance that the surety on a ne exect bond, which had been given in a separate maintenance proceeding, could not when sued on that bond defend on the ground that the petition on which the writ issued in the original proceeding was insufficient for the reason that this would amount to permitting a collateral attack. The attack here is direct, and for this reason the Zismer case is not applicable. Moreover, here the jurisdiction of the court itself is directly attacked, while jurisdiction in the Zimmer case came seems to have been conceded.

Section 15 of the Attachment act (Smith-Hurd's Ill. Rev. Stat. 1929, pp. 172-3) expressly provides that when any defendant in attachment gives bond, "the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishees, set aside, and the cause shall proceed as if the defendant had been seasonably served with a writ of summons." There is no such prevision in the Me Exeat act, and therefore these cases relied on are not in point. Moreover, section 11 of the Me Exeat act expressly provides:

City of Chicago, 261 111. 10; were v. Sharp. 323 111. 267. Assetying that rais of construction, we held that the execute to the action and the write of an exact in ald of an action at law in term for a tigrate.

Walntiff alor contains, olding dith v. Ingdia. 95 111. 77; Marga v. Muraum A Cy., 144 Jal. 582; Marga v. More on. va 111. App. 460, and Minner v. Townson, 211 111, App. 451, Stat leans in our stal mainers, yo league of still ale besiev suchastal band and that the write thereby became Continue criticia. With the exception of Linger v. Thempour, all three cases involve a state sand decreeses for althe remembered of expression adone gover go bonds to socure a raiouse of the eroperty attached. He figure dasse held in mires and the curery on a constituent with the had been given in a viourant arischminist partitor, and had ablac to maining and J. As falling and so beatab band sell no beat the reason that tile would andume to a unitting a collegeral agt.ch. wit we are trained, and the main that the remain of the cast was a constant was nat applicable. For the target of the partition of the factor of the court 

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"Nothing contained in the preceding section shall prevent the court from proceeding at any time to determine whether the writ ought not to be quashed or set aside."

The purpose for which plaintiff sought this writ is one very far removed from the purpose for which it was originally granted. Anciently, the purpose of the writ seems to have been to prevent a defendant from leaving his home and going outside the jurisdiction in which he resided. The purpose of this writ seems to be to compel defendant not to return to the jurisdiction in which he resides, but to remain in another and different jurisdiction. The practice of issuing write such as this against interstate travellers is one, we think, which the curts should not approve or tolerate.

Defendant's motion to quash the writ should have been granted, and for the error of the court in this respect the judgment is reversed.

REVERSED.

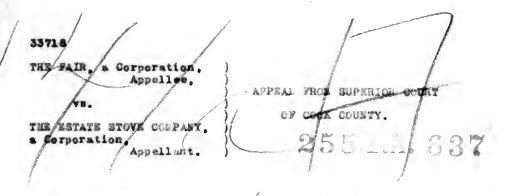
McSurely, P. J., and O'Connor, J., concur.

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MR. JUSTICE O'COMMOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover damages alleged to have been sustained by it by reason of
the alleged breach of a contract entered into between the parties.
The case was tried before the court without a jury and there was a
finding and judgment in plaintiff's favor for \$4049.57, and the
defendant appeals.

The judgment in this case was entered on the second trial. On the first trial the trial court held that the contract on which the suit is based was void for want of consideration. On appeal to this court the judgment was reversed and the cause remanded. The Fair v. Estate Stove Co., 246 Ill. App. 553. On this appeal counsel for the defendant argue at great length that the contract is void, but that question was settled on the former appeal adversely to the defendant's contention.

The record discloses that plaintiff was conducting a retail department store in Chicago and that the defendant corporation manufactured stoves which they designated Estate Heatrolas, and was desirous of having the plaintiff sell them. The contract entered into between the parties provided inter align that defendant, through its outside salesmen, would obtain orders for the sale of 120 Heatrolas, the sales to be made in the name of plaintiff. A cash payment was to be received for part of the purchase price and the balance was to be evidenced by notes of the purchasers.

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The evidence shows that the parties proceeded to carry out the contract and defendant's employes solicited and obtained 31 orders for 34 Heatrolas. Three of these orders for six Heatrolas were rejected by plaintiff on the ground that the parties entering into the purchase contracts were not entitled to receive credit. Orders for two other Heatrolas were cancelled by the purchasers, so there were but 26 Heatrolas sold under the contract. The defendant failed and refused to procure any other orders and there is no explanation in the evidence as to the cause of the failure.

To complaint, so far as the evidence shows, was made to the refusal of the plaintiff to accept the three orders nor to the cancellation of the two orders; but on the contrary defendant secured several other orders after plaintiff had rejected the three orders, and these were accepted by the plaintiff. So it is apparent that defendant did not consider the action of plaintiff as a default on its part.

Mo complaint is made as to the amount of the judgment, the only contentions urged for reversal being that the contract was void for want of consideration and that "The evidence failed to show that the plaintiff acted reasonably and in good faith in rejecting and refusing to accept the three orders for eix Estate Heatrelas, submitted to the plaintiff by the defendant for acceptance and rejected by plaintiff."

fendant on the former appeal. In that appeal it was contended that the contract was void because plaintiff could arbitrarily reject all orders for the Heatrolas which the defendant obtained. We disagreed with this contention and in disposing of it said (page 560): "We are, however, unable to agree with defendant's contention, but are of the opinion that the meaning of the contract

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is that the plaintiff would not be warranted in rejecting an order tendered by the defendant unless it acted reasonably and in good faith; that "The credit department must act reasonably in passing upon the credit of the person executing the order, and that it has no right to arbitrarily refuse to accept orders."

fendant offered none in the case) was to the effect that the manager of the credit department, when orders obtained by defendant were submitted to him, investigated the proposed purchasers to assertain whether they were worthy of credit in purchasing the Heatrolas; that letters were sent out and investigation made of each person entering into the contract, and that after all of this information had been gathered by defendant's credit manager, the orders were accepted or rejected, the only question considered being as to whether such person or persons were entitled to credit and would probably carry out their contracts; that orders for 26 Heatrolas were accepted, three orders for 6 Heatrolas rejected and two orders for 2 Heatrolas cancelled by the persons entering into them.

Counsel for the defendant contend that, since the plaintiff failed to produce the evidence on which its credit manager acted in rejecting the orders, it cannot be told whether the credit manager acted reasonably and in good faith or arbitrarily. We think this contention is not warranted by the evidence in the record. The evidence shows that a thorough search had been made by plaintiff for any written evidence upon which the credit manager acted and that most of it had been discarded and sould not be found. We think the evidence offered by the plaintiff was sufficient to warrant the court in finding, as it did, that the plaintiff acted reasonably and in good faith in rejecting the orders; in fact, there is no contention that the action of the

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oredit manager was not in good faith in every particular. The evidence is that he passed upon the credit of the parties entering into the orders for Heatrolas the same as he did on every other person applying to the Fair for credit. In the absence of any countervailing evidence tending to show that the action of the credit manager in rejecting the orders was not made in good faith, we think the court was entirely warranted in entering the judgment in plaintiff's favor.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McGurely, P. J., and Matchett, J., concur.

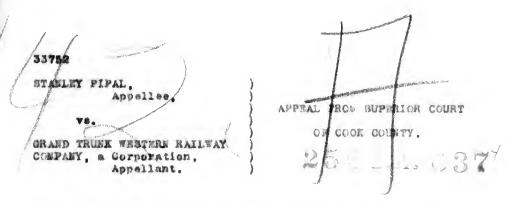
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ER. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Fluintiff, basing his claim upon the Federal Employers Liability act, brought suit against the defendant to recover damages for personal injuries sustained by him through the alleged negligence of the defendant. There was a jury trial and a verdict and judgment in his favor for \$40,000, and the defendant appeals.

The record discloses that on August 7, 1928, plaintiff, a section-hand employed by defendant, was helping unload steel rails from a car located at about 139th street, in Cook County, Illinois. Two section gangs were unloading the rails and placing them near the railroad tracks on cross-ties over a ditch. Plaintiff was standing on the pile of rails engaged at his work when one of the cross ties under the rails gave way, causing the rails to fall and severely injuring him.

The defendant contends that the Federal Employers Liability act does not apply, but that plaintiff was entitled to receive compensation as provided in the Workmen's Compensation act of this State, the argument being that at the time plaintiff was injured he was not engaged in interstate commerce.

In passing on the meaning of the Federal Liability act where the question was similar to the one here involved, the United States Supreme Court in Chicago, Burlington & Quincy Railread Co.

v. Harrington, 241 U. S. 177, said (p. 180):

"As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion and
the true test of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged

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The same rule has been announced a number of times by our Supreme Court. <u>Kusturin v. C. & A. R.R.Co.</u>, 287 III. 306. The question therefore is: Was plaintiff at the time of his injury engaged in interstate transportation of in work, so closely related to it as to be practically a part of it?

The evidence shows that on August 4, 1928, two ears of railroad rails belonging to the defendant were transported from Durand, Michigan, consigned to defendant's track superintendent, J. Rolan, at Blue Island, Illinois. One of the care was a Hutland car and the other a Grand Trunk car. Kolan knew before their arrival, which was about four o'clock on the morning of August 6. that the rails were coming. He gave orders that the cars be placed at 139th street and told the foreman to unload the rulls as close as possible to 139th street, which is at Blue Island, as this was the only convenient place where he could get them out afterwards if he wanted them. When the cars arrived they were placed on "hold track number two." which was about 600 feet south of the Grand Trunk station, Blue Island. After the cars arrived and during the day of August 6th, the yardmaster, in switching in the yard, moved the two cars two or three times. The next day, August 7th, the yardmaster ordered the cars delivered to 139th street, a distance of about one-half mile, where they were unloaded. Two section gangs. of one of which plaintiff was a member, were sent to unload the rails. They unloaded the Grand Trunk car and then proceeded to unload the Ratland oar. Cross-ties were placed across a ditch near the side of the railroad track on which the rails were being placed. Plaintiff was standing on the pile of rails in the discharge of his duty when the rails collapsed on account of the breaking of the ties underneath. Both his legs were severely injured.

The defendant contends that when the cars were placed

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The each rule has been casuated a number of line of our say our Supreme Court. husture by the relation to the total to the total statements to a number of the work so closely related to it so to be are contented to the set be are colonely for the colonely selected to the set be are colonely for the colonely selected.

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on number 2 hold track on the morning of August 6th, the interstate phase of the work was ended, and that what was done that day in moving the care about and afterwards plucing them near 139th street, and plaintiff's work in unloading the rails on the 7th, was intrastate work and that therefore there is no limbility. In support of this the cases of C. B. & Q. R.R.Co. y. Harrington, 241 U.S. 177; Lehigh Valley R. R. Co. v. Harlow, 244 U.S. 183, and other cases are cited. We think it would serve no useful purpose to analyze the numerous authorities cited by each side, for we are of the opinion that all the evidence shows that the cars in question had not reached the point of destination until they were placed near 139th street on August 7th. The testimeny of defendant's track supervisor, which we have above referred to, shows that he knew the rails were being transported and gave orders that they be placed as near 139th street as possible where they could be unloaded; and we think that until the cars were "spotted" near 139th street for unloading, they had not reached their destination. Placing them, on the morning of August 6th, about one-half mile distant on hold track number 2, was a temperary stop. The unloading of an interstate shipment has been held to be so closely related to interstate transportation as to be a part of it. B. & C. S. W. R.R. Co. v. Burtsch. 263 U. S. 540. So we think plaintiff came under the Yederal act. .

Moreover, there is evidence in the record to the effect that the defendant was having the rails unloaded at 139th street so that in case it thereafter determined to use them they would be accessible; that about two months afterwards some of the rails were used in the repair of the tracks in the vicinity of 139th street. The defendant contends that since there was an intervening movement between the unloading of the rails and their use in the construction of the tracks, the unloading of them was

on number 2 held track on the hounds of August Sta, the interestate phese of the werk was ended, and that what was done that day in moving the care about sud offerwards charling than near 139th street. and plaintiff e cork in actor one actor on the 7th, vas intrastate work and that therefore there is no limbility. In ampacrt of this the cases of C. F. & L. E.P. Co. v. Saurington, 241 U.S. 179; landen Yallay H. H. Co. v. Lunder, Red U.F. 183, and other sames are cited. We taink it would serve no conful ourpose to shalpy a the numerous watherities wited by each side, for we are of the opinion that all the evidence shows that the care in amounted had they becall arow well littly politationed to integ and backer tod "Mosts at tanhanian to your item to the sale of the sa oils want oil stade acres to the total and the stade of the transfer and t sulla ware being transported unity are orders that they be pluced as rear 139th street as persible where they could be unlauded; and we The theuse of the table "besseys" area area and figure tous delict unloading, they but not reached their darkington. Panales Links. on the morning of Augus Sth. Goul one-half wild discass on hold arack musber 2, was a temperator etop. The ankoaling of an interstate addingered has over itely to be adorate related to interstate Transportation so to be a part of th. B. B. C. C. L. C. Y. Pertuch, 265 U. S. 540. No we tains aleast T can ander the Pederal cot.

Moreover, there is selected to exidence in the record to the affect that the defendant was beving the relicated of 180 in attreet eo that in case is therefor determined to the them they would be accessible; that afold the accessible that afold the accessible that afold the final antermitis case of the reliable to the final in the siculative of the interest. The defendent content content of the circa that the construction of the unicalizer of the terresting accesses before the unicalizer of the theory at the construction of the trace, the anterior of the terresting of the trace of the anterior was

not of an interstate character. On the other hand, there was evidence tending to prove that the rails in question were shipped from Durand, Michigan, to Blue Island, Illinois, by the defendant to be used by it in the repair and maintenance of its tracks. At least reasonable minds might reasonably draw such inference from the facts in evidence and therefore the question whether plaintiff was engaged in interstate work within the meaning of the Federal act was for the jury to decide.

A further point is made that the plaintiff assumed the risk and therefore the defendant is not liable. In support of this centention it is argued that plaintiff and two of his witnesses who were working with him at the time, testified that there were two complaints made concerning the dangerous condition of the ties on which they were piling the rails - one about ten o'clock in the morning and the second about two o'clock in the afternoon on the day of the accident, and that on each of those occasions the foreman of one of the section gangs engaged in the work ordered that additional ties be brought to eliminate the danger: that plaintiff therefore knew of the dangerous condition because he helped build the foundation under the rails, and having continued to work he assumed the rick. There was other evidence to the effect that the defendant's foreman ordered and directed the men to continue/work after his attention had been called to the condition of the crossties, and assured the men they could proceed with safety. In Slack Harris, 200 Ill. 96, it is said (p. 109):

"Again, a master is liable to a servant, when he orders the latter to perform a dangerous work, unless the danger is so inminent that no man of ordinary prudence would incur it. Here, the appellac received orders from the engineer under whose control and direction he was placed by the appellant, as to how he should operate the elevator\*\*\*.

"Even where a servant has some knowledge of attendant danger, his right of recovery will not be defeated, if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the ofrematances.\*\*\*\*

"The question, however, whether the risk incurred by the appelles was one of the usual and ordinary incidents of his

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employment, was left by the instructions to the jury; and, as it is a question of fact, "\*\* It is a preper question to be left to the jury, under all the evidence, whether the risk is assumed, or not."

In the instant case the question whether plaintiff had assumed the risk was submitted to the jury by instructions given at defendant's request. By its verdict the jury found against the defendant, and upon a careful consideration of all the evidence we are unable to say that the finding is against the manifest weight of the evidence. In these circumstances, we are not warranted in disturbing the verdict of the jury.

The defendant further contends that the verdict and judgment should be set aside because the jury was misled by the inflammatory language of counsel for the plaintiff which biased and prejudiced the jury; that the verdict is "beyond all reason in amount;" that, in the selection of the jury, counsel for the plaintiff evolved a plan to obtain an enormous verdict; that plaintiff asked prospective jurors whether in case they found for the plaintiff they would give him "full compensation and full measure of damages;" whether, in case he were selected, and found in favor of plaintiff, he would "adequately and fully compensate plaintiff for his injuries;" that this erroneous examination was strengthened by plaintiff's counsel in his argument to the jury where he referred to plaintiff's "terrible lose" and told the jury that plaintiff was entitled to recover his full measure of damages, that plaintiff was "a hopeless cripple."

The court sustained objections to some of the questions propounded to the prospective jurors and they were instructed that in case they found for the plaintiff they would fix the damages at such sum as the jury found would be fair and just compensation for the injuries sustained. Other complaints are made as to remarks made by counsel for plaintiff in his argument to the jury, which we think it unnecessary to mention here because after a

్రామంలో మంది స్వాటులో కుండి ప్రామంలో కార్ మంది కిర్మాణికి ముంది ప్రామంత్రులో మంది కిర్మాణికి ముంది ప్రామంత్రుల ముంది ముందుకు ప్రస్తున్న కిర్మాణికి మంది ప్రస్తున్న ముంది ప్రస్తున్న ముంది ముంది ముంది ముంది ముంది ముంది ముంది ముంది ముందుకు ముందుకు ముందుకు ముంది ముంది ముంది ముంది ముందుకు ముంది ముంది ముంది ముందుకు ముంది ముంది ముంది ముంది ముందుకు ముంది మంది మంది ముందుకు ముంది మ

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careful consideration of the question involved we have reached the conclusion that we would not be warranted in disturbing the judgment on account of the questions prepounded to the prospective jurers or the argument of counsel.

Is the verdict so excessive as to warrant interference on our part?

At the time plaintiff was injured he was 32 years old; he was born and raised on a farm and had been engaged in farming up to a few months before the accident. Prior to the accident he was in good health and had never received any serious injury. After the accident he was confined to hospitals for more than five months. Both of his legs were severely injured; they were crushed and both became infected. On August 29th the left leg was amputated between the knee and ankle; before this was done the surgeon had operated on or lanced it about ten times; after the amputation it was necessary for the surgeon to make an incision in the stump of the leg because there was pus. The right leg was operated upon and lanced daily for eight or nine days and when he left the hospital the leg was swollen and discharging pus. X-ray pictures of the right leg show that the foot and ankle are firmly fixed, ankylesed, and incapable of movement either in ankle or tareal joint. The plaintiff has a turned out, flat foot, fragments of bone are shown protruding from the ankle. The injuries to the right foot and ankle are permanent. Plaintiff was able to be out of his house on crutches three times before the trial, which began April 1, 1929, a period of nearly eight months. He was unable to wear a shoe but was compelled to wear a slipper. Defendant admits that plaintiff has suffered a total permanent disability. By this his counsel say they do not mean to admit that in the future he will be entirely helpless.

Many cases are cited by defendant's counsel tending to show that the verdict is excessive. While a number of authorities

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are cited which counsel for the plaintiff contend are to the effect that the amount of the verdict is warranted by the evidence, we think it would serve no useful purpose to analyze these cases. The amount of damages in cases of this character depends upon The circumstances of the case and is not a matter of mathematical computation. Plaintiff was 32 years old, in good health, and at the time of the accident was earning about \$1,000 a year. He testified that during all his life and until a few months before the assident he worked on a farm where he earned more than on the railroad. He has been totally and permanently disabled. A consideration of the evidence as to the nature and character of his injuries and the treatment he received by the surgeons proves beyond question that his pain and suffering were very great, and of course this is, under the law, an element of damagee. While the amount of the judgment is large, yet we are unable to say, after a careful consideration of all the evidence, that it is so excessive as to require interference on our part.

The judgment of the Superior court of Cook county is affirmed.

AFFIREZD.

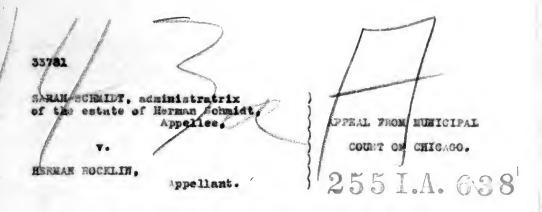
McSurely, P. J., and Matchett, J., concur.

really end of the later officering and the language making best of the ow , partyr all at refugeracy of dichier and to dispus und said think it would ceree no unclud purpose to enelyse there care. notes a trained representation and the teacher of washings to breake a fill Inclesion of the constant of its not be able to be and the first of the constant of the consta compatation. il sintiff was if yours the, is great to the and of the time of the sections that carriers, where it, is a real in sentified the median sale has been and control of the colors bearings are as in a parca herin as exact in a bodacom and table a self ratirond, Ho was bore totally and pure carally derabled, a comnig to the contract of the extension of the contract of the contract of gar - - and the self ad betraken to be thought but be taulated server in the server of the party of the server of the server and the server and the server of the s BOUTSE FRIEND AND A VIEW LOVE OF THE WAY WE ARE A CONTRACTOR TO SELECT TO THE SELECT THE ration green of side on the second of the training self in the constant a granding compatibility is the time without a, the companies of the companies are to recult a interior react a closer or as

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MR. JUSTICE O'COMBOR DELIVERED THE OPINION OF THE COURT.

Plaintiff caused judgment to be entered by confession on a lease in her favor and against the defendant for \$725 which included \$50 attorney's fees. The rent claimed was \$75 a month for the months of September, 1927, to May, 1928, both inclusive. The defendant filed an affidavit and moved that the judgment be opened up and that he be given leave to defend, which was accordingly done. The affidavit stood as an affidavit of merits. The case was then heard before the court and there was a finding and judgment in plaintiff's favor of \$575, and the defendant appeals.

It appears from the evidence that defendent paid all rent while he occupied the premises. Evidence was offered tending to show that he had vacated the premises at plaintiff's request, although this was denied by plaintiff. It further appears that whortly after defendant vacated the premises, plaintiff found another tenant who apparently entered into a lease and occupied the premises for a time; that plaintiff obtained from this tenant \$150 which the court allowed as a credit upon the judgment.

One of the defensesinterposed was that the place was let to the defendant by the plaintiff to be used for gambling - taking bets on horse racing. Plaintiff offered evidence to the effect that she had no knowledge of the purpose for which the premises

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Plaintiff tauence independ to be entered by conformed on a lease in her farm and against the defendant for 1725 file included 150 attemnts of factors. The real claim was 150 a menth for the months of factors, 1927, to May, 1933, for inclusive.

The defendant filed an officavit and weren that the jurgment he opened up and that he be given leave to antere, which we a saturdingly done. The afficavit wind real to method, which we assorblingly done. The afficavit wind is an afficavit of werlter. The reservant helps helped the court and there was finding and judgent in plaintiff a favor of you, and the defendant appeals.

It appears true the cricemes that defeated poid all rest while he occupied the premiens. Indeed was offered tending to choo that he had reacted the premiens at plaintiff a request, alter this was desied by plaintiff. It further appears that shortly after defendant reacted the premiess, detailed found another tensus who appearantly entered into a least une opened of the premiess for a time; that plaints I which the opened the tensus from this tensus the premiess for a time; that plaints I which the court along the tensus.

One of the defensesistingned was that the process of the same of the plainting of the granifag of the plainting to be used for granifag of the batte on horse rading. Flainting offered eximuse to the effect that the had no impoledge of the gargose for chick the particular car particular.

were to be used, while evidence was offered on the other side to the contrary. No brief has been filed on behalf of the plaintiff in this court.

The defendant urges a number of points in his brief to sustain his contention that the judgment should be reversed, but in the view we take of the case, we think it will be necessary to consider but one of them.

and the defendant and another as lessees. It is the ordinary printed form of lease but in the space left blank for the purpose of writing in the property demised, it is described as "Store & basement to be occupied for Smoke shop and Cigar Store." There is no further description of the location of the premises. The lease is signed by the lessees and by "Herman Schmidt Estate, by Sarah Schmidt, Administratrix," and the point made by the defendant is that the lease is void. That he can raise this question since he has vacated the premises and is not occupying them under the alleged lease.

The evidence shows that Herman Schmidt apparently owned the premises in question and that he died prior to the making of the lease; that plaintiff was his daughter and had been appointed administratrix of the estate, and that Herman Schmidt left other heirs, who, together with the plaintiff would inherit the property. Under the law in this state, the administratrix has no authority to take charge of and rent the real estate belonging to the estate. The lease having described Herman Schmidt as the landlord and he having didd prior to the making of the lease, and the document having been signed by his administratrix we think renders the alleged lease void and of no effect. We think we ought to say that the point was not raised in the trial court but the contention being that the lease was void on its face, we think can be raised for the

vere to be used, while evidence was offered on the other side to the centrary. No brief has been filed on behalf of the plaintiff in this court.

The defendant urges a number of points in his brief to quetain his contention that the judgment should be reversed, but in the view we take of the case, we think it will be necessary to consider but one of them.

The losse involved is between Arrans Schmidt, lesser, and the defundent and another at lessers. It is the the pripass printed form of least but in the space left hismit for the purpose of writing in the property contact, it is described as "Store & Leoment to be occupied for Goods shap and Other there is no occupied for Goods shap and Other the former description of the least and by "Herman Schmidt Srinks, by least the leaster and by "Herman Schmidt Srinks, by Sarah Cohmidt, commissionisting and the point ands by the follows in that the least is void. That he can raise this president has been avented the president and the comprint that the president and the new vector the president and the comprint that the president and the new vector the greater and the new vector that the president and the new vector the greater and the new vector that the president and the new vector that the president and the new vector that the president and the new vector the greater and the new vector that the president and the new vector the president that the president and the new vector that th

The evidence above that Samon Admidt apparently comed the premises in question and the the discrete to the making of the loase that plaintiff was his daughter and has seen appointed administratiff of the contest and the daughter and the the plaintiff was the daughter and the transmission of the property hair the law in this chair, the administratiff has no successfy hader the law in this chair, the real solution as an accuration for the factor having described formed to the daughter and the laws of the house. The laws have also been along the house the alleged lease having the administration we have the alleged lease that an extend the the laws and the administration we engite the point that and the time that the point was not raised in the time to be the thing that the course the the course that the course the the course that the course the the course that the course the state of the the course that the course the course that t

first time in this court.

In view of our holding that the lease was void, the judgment must be reversed. But since there can be no recovery under the lease, the cause will not be remanded. The judgment of the Nunicipal court of Chicago is reversed.

REVIRGED.

McSurely, P. J., and Matchett, J., concur.

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a Corporation. appellant,

ROBERTS & SCHARFER COMPANY Corporation.

Appellee.

FROM CINCUIT COURT OF COOK COUNTY.

MR. JUSTICE O'CORNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse a judgment of the Circuit court of Cook county, entered on the verdict of a jury finding the defendant not guilty. The record discloses that plaintiff brought suit against the defendant to recover \$17,500 which it had paid to one of its firemen on account of injuries he sustained through the alleged negligence of the defendant in the construction of a sanding plant for plaintiff at Conemaugh, Pennsylvania. This is the second trial of the case. On the first trial there was also a verdict and judgment in the defendant's favor, which on appeal to this court was reversed, principally on the ground of faulty instructions. Pennsylvania Company v. Roberte & Schaefer Company, 250 Ill. App. 330.

A statement of the facts will be found in the opinion of this court on the former appeal, so that it will be unnecessary to state them at large here. It will be sufficient to eav that the evidence discloses that the defendant had constructed a sanding plant for plaintiff for sanding plaintiff's lecomotives; that the plant has been substantially completed a week or two prior to February 7, 1924, the date of the accident; that defendant had requested plaintiff to use the plant in sanding its locomotives before it was finally completed and turned over to plaintiff; that plaintiff preceded to do this and had been using the plant for sanding its locomotives for about two weeks or ten days prior to

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Pebruary 7th. About nine o'clock in the evening of that day an employe of plaintiff was endeavoring to sand a lecomotive by operating the sanding plant but he was unable to open the falve which let the sand from the plant into the locomotive and called upon another of plaintiff's employes to assist him. They were on top of the locomotive pulling the lever which opened the valve, when a weight weighing about 32 pounds attached to an arm by means of a set screw and suspended about 24 feet above the ground, slipped off the arm and struck plaintiff's fireman who was coming to take the locomotive on a regular trip and he was very severely injured. Afterwards he brought suit against the plaintiff which plaintiff settled with the fireman by paying him \$17,500.

The plant was not turned over by the defendant to plaintiff and accepted by the latter until about March 1st, which was about three weeks after the accident. The evidence also shows that when plaintiff's two employes were endeavoring to sand the locomotive they pulled the lever hard annumber of times in an endeavor to open the valve, and at the time a key or belt, which fastened the lever on which the counter weight was attached, was severed or sheared off, allowing the lever or arm to fall downward.

Plaintiff's theory of the case was that the counter weight was insecurely fastened to the arm by means of the set screw - that the screw was too short. While the defendant's theory was that the counter weight was properly and securely attached to the arm and that the accident was brought about through the rough usage by plaintiff's employes, and that such usage caused the key which fastened the lever to shear off, thereby letting the lever fall downward, which was a contributing cause to the accident. A witness for plaintiff testified that the manner in which the counter weight was secured to the arm, by means of the set serew, was a common and accepted method of construction.

Sebrusry 7th. About mine o'glock in the evening of that day an employe of pisintiff was endeavoring to each a locusotive by operating the sanding plant but he was untill to open the faire which is the sand from the plant force the locasetive and called upon another of plaintiff's employes to assist him. They were outop of the locasetive publics the lever which opened the velve, when a weight weigning about 15 pounds attached to a me by means of a set serey and suspended about 26 feet above the ground, slipped offthe are and suspended about 26 feet above the ground, sipped offthe are and suspended shout trip and be seen were very severely to take the locasistive on a regular trip and be seen very severely injured. Afterwards he brought sait against the plaintiff with a plaintiff settlet sith the firement by paying his plaintiff with the plaintiff with the plaintiff with the plaintiff settlet sith the firement by paying his (14,60).

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The jury apparently took the defendant's theory of the case and found in its favor. They were told in an instruction requested by plaintiff that it was the duty of the defendant to exercise ordinary care to so construct and maintain the plant that the counter weight would not fall down, so that plaintiff's employes, who were in the exercise of ordinary care for their own safety, might not be injured. And at the request of the defendant the jury were instructed that unless they believed from the evidence that plaintiff had proved by its greater weight that the injuries sustained by the fireman were caused by the negligence of the defendant as charged in the declaration, then they should find the defendant not guilty.

The charge in the declaration was that defendant had insecurely fastened the counter weight to the arm. The issue was simple and clearly understandable by the jury. And, upon a careful consideration of all the evidence in the record we are unable to say that the finding in favor of the defendant is against the manifest weight of the evidence. In this holding it ébviously follows that the court did not err in refusing to instruct the jury to find for the plaintiff, nor in overruling its sotion for a new trial.

Complaint is made by plaintiff to the giving of instructions numbers 9, 10, 13, 14, 15, 16 and 17 at defendant's request. By instruction 9 the jury were told, in effect, that the fact that the fireman was injured and plaintiff had sustained damages on account of such injury, was not of itself sufficient to charge the defendant with liability; that the burden was on the plaintiff to prove the specific negligence charged in its declaration. Complaint against this instruction is that it used the language, "the specific negligence charged in its declaration," but did not tell the jury what negligence was charged in the declaration. On the former the fury apparently took the differian. To the fig the fire for the first the the case and found in its forer. They see split the antiferious requested by plaintiff that it was the anty of the inferious to plant that state are determined and maintains the plant that the causter solution and mainters solution that the the same is the case of the first part of a the first of the same in the same in the request of the deep mate the first of the deep mate that plaintiff had proved that maintained by the first and the same was subjected from the injuries shall had proved by its grancer weight that the injuries shall had proved the forestion of the report of the injuries shall had by the first and the feathers as charged in the declaration, here they also first the definition of the first the following or the states of the first the definition of the first the definition of the first the first the first of the first of

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and on the second trial the evidence was not so materially different as to render it seriously objectionable. As we have stated, the issue in the case was whether the counter weight was securely attached to the arm. The issue was simple and specific and we are certain the jury was not in any way misled by the instruction.

Noreover, instruction number 6 was given at plaintiff's request, and referred the jury to the allegations of the declaration.

By instruction number 10 complained of the jury were told that it was their duty to decide the case from the evidence received in open court; that any evidence offered to which objection was sustained or which was stricken out by the court, should not be considered, and that statements made by counsel for either side, if any, which were unsupported by any evidence, should be disregarded by the jury. It is contended, as stated by counsel, that "the vice of this instruction is that without an objection to argument of counsel the court abdicates and passes the question of relevancy to the fancy of the jury." But we think the instruction is not subject to the objection. It is certain that we would not be warranted in disturbing the judgment in such a case as the one at bar for every little inaccuracy that might appear in an instruction.

Instruction number 13 told the jury that in arriving at their verdict they were not required to set aside their observations and experiences as men, but that they had the right, upon a consideration of all the evidence, together with their experience and observation, to say "where the truth lies upon any material fact in the case." It is contended that the instruction authorizes the jury to consider all the evidence in connection with their experience as men and based upon such consideration, to determine any material fact in the case. And a number of authorities are cited where it is held such an instruction was erroneous on the question

appeal we held this identical instruction not resolved entropous, and on the second trial the evidence see not as safethells differed to render it seriously objectionable. As we have stated, the issue in the case was shotter religible was securely sivilathed to the arm. The leave was elsely and and specific or i we not tached to the jury was not in any way hisled by the instruction number 5 was given of plannist or request.

Moreover, instruction number 5 was given of plannist or request.

told that it was their fully to decide the cuse from the cyllenge received in open court; that say evidence off red to entitle objection was suctined to open court; that say evidence off red to entitle objection was suctined by and that its sents made by contract for other off in the considered, and that its sents made by contract for other off if any, which were usoupported by any evidence, whould be refreshed by the fary. It is contanted, no stated by contract on the research of this instruction is that witness the objection to use, ment of coursel the court of factor and places the resident of relevancy to coursel the court of that we take the theorem of the fury. It is ceitain the that the objection. It is ceitain the that the reaction is not at the formation in the courtest in the objection. It is ceitain the case as the can at the for every distinction that in outh a case as the can at the for every little inaccuracy that also outh a case as the can at the for every

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Lions and experiences as and, our test insy had to it is, well a consideration of all the exidence, tage has the resistance and observation, to say fance the traticities whom any exterior fact in the case. It to contended that has incorrected and the fury to consider all the exitence in consection of their case perience as non and based and outside in consider the resistance of their case as non and based and outside sites it is not the case. And a summer of all content to the case the consection of the case all the case. And a summer of all contents to the case in the case. And a summer of all contents are the best on the case, and the traction are as all the best on the traction are as all the best on the case.

of damages where there was specific proof of certain items of damages. We think these cases are not in point. The question of damages does not arise here since the jury found in favor of the plaintiff. We are of the opinion that the instruction did not prejudicially affect plaintiff's rights. As stated, the specific point in controversy was, whether the counter weight was securely fastened, and we think it clear that the jury understood that this was the material point in the case.

By instruction 14 the jury were told that in making up their verdict the first thing for them to determine was whether or not there was any liability on the part of the defendant to compensate the plaintiff, and the fact that plaintiff had paid its fireman for the injuries he had sustained "is not alone an element to be considered by the jury in determining whether or not there is liability" on the part of plaintiff; and that if after considering all the evidence the jury believed the defendant was not liable, then they should return a verdict of not guilty regardless of the nature and extent of the fireman's injuries. Complaint is made that this instruction ignored the issue and authorized the jury to say whether or not there was any liability in the case. We think this contention is not warranted by a reading of the instruction. At any event, we think that, under the evidence in the case, the jury were not misled to the prejudice of plaintiff.

Complaint is made of instruction 15, by which the jury were teld that before the plaintiff could recover it must show by a preponderance of the evidence that the accident was proximately caused by the negligence of the defendant and that defendant failed to use such degree of care and caution in the construction of the plant as an ordinary person or persons in like circumstances would use in the construction and crection of the plant; that plaintiff

of decages miste there was apecit, order it correct tiess in the ages. We think there cases are not in think. The confidence of the damages has not also been also been also july out it favor of the plaintiff. We use of the authion that the instruction did not project claim affect. In a said it within the counter meant that in confrontery has, the first observer meant that are not as a counter was the material point in the case that the farm and a counter was the material point in the case.

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must further show by a preponderance of the evidence not only that the fireman was injured as a result of the accident in question. but that it must also show by a preponderance of the evidence the extent of the injuries; and that plaintiff must prove what would be a fair compensation for the dumages which the fireman had sustained by reason of his injuries. It is contended that this instruction was wrong because the declaration did not charge the defendant with the failure to exercise ordinary care in the erection of the sand plant, but that the charge was confined to the insecure manner in which the counter weight was attached to the arm. Other instructions were given at the request of plaintiff which told the jury that if they found from the evidence that defendant had "constructed the dock in question." etc. These instructions referred to the construction of the dock and not to the method of securing the counter weight, and are subject to the same objection that plaintiff now urges against instruction number 15. Under a well known rule of law, plaintiff is not in a position to complain of an instruction given by his opponent when instructions offered in his own behalf are subject to the same objection. We are also of the opinion that any inaccuracy in this instruction would not warrant us in disturbing the verdict of the fury under the facts disclosed. They knew that the only objection to the erection of the sanding plant was confined to the fastening of the counter weight to the arm.

Instruction number 18 told the jury that the question for them to decide was whether the defendant was liable "at all" and that it was their duty to determine that question before considering the question of the amount of damages; and that if they determined that the defendant was not liable they would have no occasion to consider the question of damages. It is said this instruction is bad because it did not tell the jury that it was

init alia 192 is it as at the first the residence of Ag about first take the firecan was injured on a visual to 1 to continue a security ු ුදු. - ) අත අය 1 - 7 1 යුදුකරනුවට ක ල් තුනුණි දියන්දී නිස්ත් එක්වී langer, where the little to be in protegal the tribbs a fair ormanaeach i a cui e a cui e a cui ach achtarann aire e ag and a committee of the contract of the contrac THE CONTROL OF SITE AND ASSESSED THE TRANSPORT OF THE PARTY OF THE PAR estantions while the fairtee to exercise of the exp. . . . . the rest of the rest of the court of the cou 。 我就一点的一点,这个说:"你,你不是这一点的,你就会好你,你看了这是一个话,我们就被'我说的' and the filtred of the first o RADIO STREET FRAME . 131 (A. 11...) AT TOP SOME BEDETTERNO ### Tradition for the state of the 一种, 中心, 1992年, 1992年 នា នា ប្រធាន ទោក ស្រាស់ សាស្រាស់ គឺ សាស្រាស់ សាស្រាស់ ស្រាស់ ប្រើប្រឹក្សាសនិសាស់មេរា បានជំនិង**មន្** and the second of the second o The state of the second section of the second section and the second section of the section of in the figure of the cold of the figure Satisfied in the contract south for data beinger set to sale at the signed of the first of the state of the signed and bidget ក្រុម នៅពេទ្ធ នៅស្ថាន ស្ថិត ស្រី នៅ ស្រែក ស្រែក ស្រែក ស្រែក ស្រែក ស្រី ស្រែក ស្រែក ស្រែក ស្រែក ស្រែក ស្រែក ស្រ · 4.4 (1915年) 1915年 - 1915年 courter tall 1 lat madesoon

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 their duty to determine from a prependerance of the evidence whether the counter weight was insecurely attached to the arm, and that this should have been done; and that the words, "at all" used in the instruction "would impress the jury with its supremacy over the question of liability without regard to the issue." We think the instruction is not subject to the objection made. Obviously, the question of defendant's liability must be established before the question of damages could be taken up. And as stated, the jury clearly understood what the issue was, namely, whether the counter weight was securely attached to the arm.

Instruction number 17 complained of, told the jury that the defendant was not bound to use the highest degree of care possible to avoid injuring the fireman, but it was required to use only reasonable and ordinary care under the instruction, and if the jury believed from the evidence, under the instruction of the court, that defendant did exercise such care, then there should be a verdict for the defendant. The complaint is made against this instruction that it was general and should have been confined to the exercise of ordinary care on behalf of the defendant in fastening the counter weight to the arm, which was the issue in the case. We think the instruction was not erronsous.

Upon a careful consideration of all the evidence in the record, and the instructions to the jury, we are of the opinion that we would not be warranted in saying that the plaintiff did not have a fair trial. The judgment of the Circuit court of Cook county is affirmed.

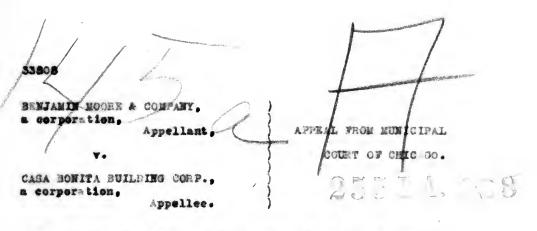
AFFIRMED.

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MR. JUSTICE O'COMBOR DELIVERED THE OPINION OF THE COURT.

Benjamin Meore & Company, a corporation, as owner of a promissory note for \$5,000 made by the defendant, Gasa Bonita Building Corporation, caused judgment by confession to be entered on the note in its favor and against the defendant for \$5,133.34 which included \$25 attorney's fees. This judgment was on motion of the defendant supported by its efficient, opened up, and it was given leave to defend. It filed its affidavit of merits and during the trial, its amended affidavit of merits. The case was tried before the court without a jury, and there was a finding and judgment in defendant's favor, and plaintiff appeals.

An examination of the evidence in the record discloses was that the case/very poorly tried by counsel, the facts were very meagerly brought out, and on the whole, there is such uncertainty that the judgment must be reversed and the cause remanded for a new trial. From the evidence we gather that the defendant was having an apartment building constructed for it by Bathan Finkel the payer in the note, at a cost not to exceed \$20,000. This contract appears to have been in writing but it was not produced and we think the court erred in overruling objections to oral evidence as to the contents of the contract. It should have been produced.

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Renjamin Roure: Company, a company as assure of a presidency note for 13,000 sade by the defendant, Case Senta.

Suilding Companytion, denged judgment by comfending to be entered on the note in the favor and against the coffendant for \$7,155.64 which included \$25 att\_mag's food. This judgment was on motion of the defendant supported by its afficevit, opened up, and it was given leave to defend. It faled its afficevit of merits and during the trial, its assailed afficavit of merits and tried before the near ultimate of merits. The case was tried before the near ultimate of jury, and there was a limiting and tried before the near ultimate of avor a stading

she washing the color of the contents in the record circlence that the color of the trick of the color of the the color of the the color of the the form of the the trick of the color of the the form of the the color of the the form of the the color of the the form of the the color of the the the the color of the color of the the the the the color of the color of the the the the the color of the colors of the color of the colors of th

The evidence of the defendant was to the effect that Finkel did not properly complete the building and that therefore it was required to complete it at a cost of more than \$2,800, but we think the evidence as to this additional cost was very uncertain and indefinite. There was further evidence offered on behalf of the defendant that it had paid this note, and five specific dates are mentioned in the testimony of defendant's witnesses on which \$1,000 each was paid. and another specific date given when another \$500 was paid. All of these payments are testified to have been made on the note, and from the dates given, they were all made before the note became due, and why the \$5,500 should have been paid on the \$5,000 note does not appear. Moreover, defendant's witnesses, who gave testinouy on these matters, further testified that after making the last payment which totalled \$5,500, there was still due from the defendant to Finkel \$560.34. No payment is indorsed on the note, nor was any explanation made why the note was not produced, delivered up, and cancelled if it had been paid as the witness for the defendant testified. Moreover, the evidence offered by the defendent shows that about two months after it had made the last payment of \$500, Finkel presented defendant with a bill showing a balance due Finkel from the defendant of \$5,560.42. He explanation is made as to why this bill should have been presented if Finkel had already been paid. Defendant, in its affidavit of merits, set up among other things that there was a failure of the consideration for which the note was given and a further inconsistent defense was that the note had been paid. We think the evidence offered by the defendant is so self-contradictory, and the record is in such a state of confusion on the facts, that the judgment must be reversed.

Plaintiff contends that when the note, indorsed by the payer, was produced by the plaintiff, under the statute it was presumed that the plaintiff was a bona fide helder in due course.

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This presumption, however, was overcome by evidence to the effect that the note was not transferred by Finkel to the plaintiff until after it was due. Finkel testified that he turned the note over to plaintiff "about a couple of weeks" before the suit was brought and the record discloses that the suit was brought October 26, 1928. The note, by its terms, was due ninety days after its date, (June 16th) which would be September 14, which was more than two weeks before the suit was brought. There is other evidence in the record to which we have not specifically referred tending to show uncertainty as to the facts but since there must be a retrial, we will not discuss the evidence further.

The judgment of the Municipal court is reversed and the cause is remanded for a new trial.

REVERSEL AND RENAMDED.

McSurely, P. J., and Matchett, J., concur.

This presumption, however, who evercome by the here to the effect that the note was not transferred by Tinkel to the pictatiff until efter if the note was not freshfied that he turned the note are to yiaintiff 'shout a comple of weeks' before the suit was brought to yiaintiff 'shout a comple of weeks' before the suit was brought of and the record discloses that the cuit was brought or other Population The note, by the terms, was due min by they after the date. (June 16th) which needs be depended it, which eas some then two weeks before the entity we have see treather the hard see the other extremes the theer and the entity as the fixth which we have see the three these the see that also we have the chart of the profile and there must be a retrial, so when

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon, FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
FLOYD S. CLARK, Sheriff.

255 I.A. 338

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



HOWARD GADDIE LILLE E. S. T. T. ST.

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The true i government ollant :

tust vs. reac. . . And . . . . . . APPEAL FROM THE WILLIAM R. WHITTAKER TO STADY TO STADY

Jones. J: approx and y bo, of the parelets as it i

that the This is a suit for slander. Upon a trial, the jury returned a verdict for \$12,000 in favor of appellee. Whittaker. The Court required a remittitur of \$7,000 and then entered judgment against appellant for \$5,000 and costs. The declaration charges that appellant on several occasions said appellee was a thief and had stolen 500 bushels of corn from him.

It is urged that the Court erred in refusing to allow appellant to explain the absence of a witness; that counsel for appellee were guilty of improper conduct during the trial: and that the verdict of the jury is the result of passion and prejudice and could not be cured by a remittitur.

The record does not show that the refusal of the court to allow appellant to explain the absence of the witness Dillon was in any way prejudicial. No statement was made as to what was intended to be proved by the absent witness and it was not shown that he was subpoensed or that any diligence was exercised to have him in court.

The plea of not guilty admitted that the words alleged to have been spoken were not true, but denied that they were spoken by defendant. (Reeves v. Roth, 179 Ill. App. 95.) The only issue of fact therefore was whether or not appellant spoke the words or the substance of the words averged in the declaration. The weight of the evidence shows that the defendant used the words charged against him and that he repeated them on several occasions. Under the circumstances, a verdict against him was warranted in a proper amount.

But the conduct of appellee's counsel, and the character of their argument to the jury was so inflammatory that it was calculated to unduly influence the jury and cause it to bring in such a grossly excessive verdict as it did. Where damages

allowed by a jury are so excessive that they can only be

accounted for on the ground of prejudice, passion, or misconception, a remittitur will not obviate the error. (Wahash Ry. Co. V. Billings, 212 Ill. 37.) The verdict is an excessive that we reach the conclusion the jury acted largely from passion and prejudice. A verdict for so large an amount was unauthorized. The trial court recognized that ract and required plaintiff to remit approximately 60% of the verdict. We are at the opinion that the amount is still too large. If within twenty days after the filing of this opinion, the plaintiff will remit the further aum of \$2,000, the judgment will be affirmed in the sum of \$3,000 in this court. Otherwise, it will stand reversed and the cause remanded.

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STATE OF ILLINOIS,  88.  A WIGHNIG A MOUNT OF A PARTIES COURT IN
SECOND DISTRICT I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, thisday of
in the year of our Lord one thousand
nine hundred and twenty-
Clerk of the Appellate Court
(52761—3M—7-27)



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

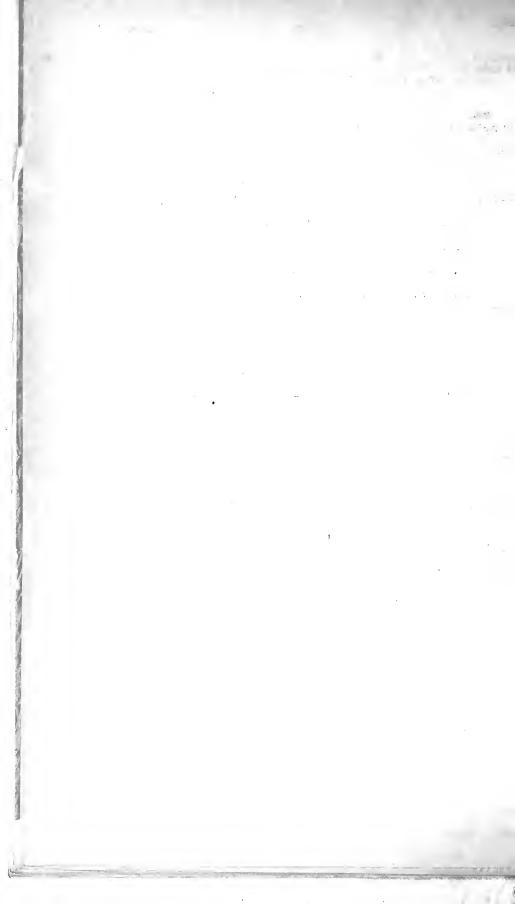
JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 638<sup>2</sup>

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



ROSELLE STATE BANK, a Corporation, appellee

vs.

E. J. BASYE, et al

(J. I. PORTER COMPANY)
appellant

APPEAL FROM CIRCUIT COURT OF DU PAGE COUNTY

Jett, J.

Roselle State Bank, appellee, on September 2, 1921, filed its bill of complaint, making E. J. Basye, L. R. Ash, C. C. Cox, and J. I. Porter Company parties defendant, alleging an indebtedness due it from Basye and praying that an accounting be had between said Basye and complainant and that upon the taking of such account, the defendent Basye be decreed to pay complainant such sum as may be found to be due it, and in default thereof the master be degreed to sell certain notes, and a real estate mortgage securing the payment thereof, which were held by complainant as collateral security. All of the defendants were non-residents and were served by sublication and mailing of notice as provided by statute. None of the defendants appeared, and on November 7, 1921, a decree was duly rendered, which found that on June 30, 1920, Basye became indebted to compleinant in the sum of Five Thousand Dollars (\$5000.00) which sum he agreed to repay on January 1, 1921, together with 75 interest thereon; that to secure the payment thereof he deposited with complainant, as collateral security, two notes, together with a mortgage upon some Arkansas land; that said notes were executed by defendants Ash and Cox, were dated May 21, 1920, were payable to the order of Basye, and both were endorsed in blank by him; that one note was for the principal sum of \$5000.00 and due January 1, 1922, and the other was for \$4270.00 due January 1, 1923; that by the mutual agreement of Ash, Cox, Basye, J. I. Forter Company and complainant, the defendant / Ash and Cox, executed on August 8, 192/ their two notes each dated June 20, 1921, each payable to the order of H. M. Franzen, who was the Cashier of Complainant, one for the sum of \$5304.62, due January 1, 1922, the

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VB.

E. J. BASYE, et al (J. I. FT R 70 TAJY) appoliant

Jobt. J.

Roselle State Frag, op elles, in ruterier Lill. Cox, and . I. . orter in jory or the a dole or it, albeing an indestructs in full arivarg fine avail nort if our appropriate end thou does for the design of ins eyest bisc reewed had ed taking of such secount, the defend at Maye be needed to pay complainant such such as 'w' be round to be 'ue it, and in default increof the antir he nearest to tell servite cater, end a real estate sortamente nen ullum te en ment duerce". - Jen ment of the file .vorm w. i measiler as themiologies & bled into cildu id fevice erer be alveir ca-mos ere estableteb and resiling of votine as revided by attractor of the deronants apparend, and on "overbox 7, 1921, a decree was bily renderel, which that on day o A. 1920, Angre been be indebted to com let ant in the set of divo in more a nelliga (15000.00) which are in ereed to reprove the day of the 171, together Ath 7 Interest therein; first an earlies the incident , fifter, all defice or , are all a compact indiac ob ad accounts two notes, togeth is with a locistim a on the color wats built one got the recommend the firm and resembled und dated of all arthauting of our organisation of the total both were endorsed in black by hing and ne joyo an ing ing principal aut of 5000.00 teat to the state and the other was text 4 TO. Of day design, i the text tende antima agreement of "ab, ber, serve, T. I. or by by the ne es lainent, the doir hone; 'er our 'e , e r con ch en .

other for the sum of \$4270.00 due January 1, 1923, each bearing 7% interest and each secured by a second mortgage upon the said ereplain re Arkansas land: that these notes and mortgage were by the agreenoton wi. ment of all the parties substituted for the collateral notes dated May 21, 1920, and the mortgage given to secure their payment. The decree further found that there was due complainant the sum of \$5076.43, from Basye, and that complainant was entitled to to tas romition rest have the collateral sold to pay the same, and decreed that in default of such payment being made within five days that the Master should sell the collateral at public auction. In pursuance to the provisions of this decree the Master, on December 12. 1921, sold all the collateral to said Franzen for the full amount of the debt, interest and costs and complainant recovered from the Master the amount of its debt and interest.

On June 13, 1923, J. I. Porter Company, by leave of court, filed its petition in which the foregoing proceedings were recited and which alleged that it had never received any notice of the jendency of the proceedings until it was so advised by complainant in a letter dated March 22, 1923, written in reply to an inquiry from the Porter Company. "In accordance with the TOTES. prayer of the petition, leave was granted J. I. Forter Company to answer the bill and by its answer it admitted the indebtedness from Basye to Complainant and the delivering to complainant of ard in 1200 The read well bear took with the collateral notes and mortgage as alleged. The answer then 20, 1921, both wim. E by L. .. alleged that on Maron 20, 1921, the said Basye duly assigned 750 de 15.79 to the f. I. Porter Company his equity in said collateral notes and mortgage to secure the payment of \$4060.50, Basye then being indebted to the Forter Company in that sum; that said tee saute from termina assignment was sent by the Porter Company to the complainant and duly received by it. The answer then alleged that prior to March 20, 1921 Basye was the owner of this Arkansas land, and DE 2000 100 being indebted to complainant in the sum of \$20,000.00, had secured the payment thereof by a first mortgage thereon; that complainant desired to have the balance remaining due on this first mortgage paid, and arranged with George M. Foreman of Chicago to make a new loan of \$17.500.00, being the amount then remaining due thereon; that at the request of complainant, acting through its

Cashier, Franzen, the J. I. Forter Company agreed to such new

other for the aut of 42/0.00 the January 1, 192, . the ring y's interest and comb nected by a select every read that it is these noted for the aut collect of all the parties and adaptived for the collect of all the parties and the acrteoff for the collect of all the parties and the acrteoff for the collect of the force further found that there are one collect not the set of 300%. The decret sold the pay the come, and decret the collected to the collected to pay the come, and decret the folia the first of ye that definite of auch payment being made entitle five days that the grands of the grands of the paying all the collected of mobile auchion. In our case, but the debt, interest and assist the debt, interest and assist and and interest.

on June 13, 1923, J. J. Jerter January, by loave of court Tiled its petition in which the forestan or seedings vere reoulien was newless a reser has it that Assells delaw has believ The begander of the proceedings will it was seen in the sumplainent in a inster cased three 22, 1992, written in reoly og it's comity in the 'orther Commany. In according to the car prayer of the potision, losve and arrabad days, retor tarrar gase outofal one nattient it womens of the and flid ont wewens of to therefore at well vise out box targings of or exact north mers revure off special as agention for erior foreselles off alloged that on Tarid Dy, 1711, the call traye daily seed from the . T. order in corp of the fire with solie to the state . T. and sorteser to some one or that the total property then being indebted by one of the distance and addahad gailed and drametr of era or got the reservent of the the tre treetaires main their fenetia water wowens on" . It is herieser with him to "Are CU, 1911 forgo wer the owner of "its Di rome toud, on oster independ to sometiment in the sole 20,000,000, an econoci In the fire on के ना इ. ०० प्रकार धन ब्ल्वियान देन प्रदेश के भूते प्रेरावनामध्ये हैं एक्स्पूड्य हु बुद्धे or metro deal to beat no oil muitine a conulod and event of bering מרגם, במל מבנים על ל הבלים ווח ישים ל ל יוד ל

plan of re-financing, consenting that H. H. Franzen, Cashier of complainant, might release the second mortgage and cancel the notes which were held by the bank as collateral security, and receive in lieu thereof notes aggregating \$9250.00, secured by a 1.00 0 1 1.1 third mortgage upon said land, the first and second nortgages being given to secure notes aggregating \$17500.00; that according to the re-financing plan, new notes and mortgages were to be executed so that there would then be outstanding, as liens upon said Arkansas land, a first mortgage to secure the payment of \$15,000.00, a second mortgage to secure the payment of \$2500.00, and a third mortgage to secure the payment of \$9270.00, said notes, 1 1 1973 so secured by said third mortgage, to be held by complainant, 602 6 5 10 TEXP and to occupy, when made, so far as the interested parties to mal .70 this proceeding were concerned, the identical position as the h . ! ! " " " This I'mai then outstanding second mortgage which complainant then held for its own benefit and for the benefit of J. I. Porter Company; 1290 127 1 that thereafter said agreement was carried out and that M. M. Palint A Franzen conducted all the negotiations requisite to the refunding of the indebtedness secured by said mortgages; that the de a san a secondario notes, which had been originally assigned by Basye to the Porter Company, subject to the rights of the complainant, were cancelled and the mortgage securing the same was released of record, and in lieu thereof said bank took two notes, both dated June 20, 1921, both signed by L. R. Ash and C. C. Cox, one mr for \$5304.62, due January 1, 1922, and the other for \$4270.00 due January 1, 1923, both of these notes were payable to the order of H. H. Franzen and each bore interest at the rate of 7% per annum; that these notes were secured by a mortgage upon xix said land, which mortgage, however, was subject to the mortgages which were given to secure the payment of \$17,500.00; that the only purpose wi the J. I. Porter Company had in consenting to the refunding of said indebtedness was to oblige the complainant and to make more secure the collateral which it held for the joint use of the complainant and the Forter Company; that the notes executed by the said Ash and Cox upon the refunding of said indebtedness were at all times good and worth their full face value, and that the J. I. Forter Company did atall times

have the financial ability and was at all times ready and is

plan of re-il andick, in enting that . H. Francis Caenter cit realistant, that release to escend mortgage and cancel the receive in lies thereof notes aggregating 59250.00, geoured by a third mortgage upon wald land, the rirst and second cortgages ... being given to secure notes aggregating \$17500,00; that according to the re-financing plan, new notes and nertgages were to be executed so that there would then be outstanding, as light upon said Arkenses land, a first mortgage to secure the paraent of 115,000.00, a second mortgage to secure the payment of \$2502.00. and a third mortgage to secure the payment of 19270.00, waid notes so seemed by said third sortgage, to be held by complained to and to occupy, when made, so far as the interested parties to this proceeding were concerned, the identical position as the then outstanding second sortgues which complained them held for its own benefit and for the benefit of J. I. Pember Jompany: and all that has two belates een thousands blee retrepredt tedt -thrier out or estalmen emoliationen ent lin bitombron memer! ing of the indebtedness coored by eaid aertgages; that the notes, which had been originally agaigned by Sasya to the Porter Company, subject to the rights of the couplining, were can-Michael to market governing the arms we released by recome. end in lieu thereor seld bank test two notes, both dated June 20, 1921, both signed by L. F. Ash and C. C. Cox, one ax for 据427C+00 \$5504.62, due Jamury 1, 1922, and the ether for due Jenuary 1, 1925, both of these notes were payable no the order of H. M. Franzen and each bore interest at the rate of 7% per annua: that these netes were secured by a mortgage upon six asid land, which mortgage, however, was unbjeck to the mortgages which were given to secure the payment of \$17,500.00; that the only purpose of the J. I. Porter Company had in consenting to the Thankallage decade egilife of one enables believed a confinctor SHIP TOTE DESCRIPTION IN THE PROPERTY OF THE P Anali artectyftaganichistyfgigosochtentygianachtellangosent, eo operitot of the State of the same was not a see to see and the

now willing to pay to the complainant the amount due it upon the principal note executed by M. J. Basye, and to take over from complainant the collateral security, which it held; that the complainant knew these facts, knew the plane of business of the Porter Company, and could, had it so desired, informed the complainant that it would no longer carry the Basye indebtedness and had that been done; the Porter Company would have protected its interest in said collateral.

Basye, Ash and Cox, after filing writtenentries of appearance, consented that the Porter Company might be granted leave to answer the original bill, and that the court should onter such further order as it might deem proper. A hearing was had and the court entered a decree confirming the former decree and from this decree the J. I. Porter Company appeals.

a copy c The evidence discloses facts substantially as alleged in the answer of appellant. On march 31, 1921, appellant wrote appellee advising it that it held haspe's note for \$4060.00. and informing the bank that Basye had given them an assignment of his equity in the collateral which appellee held. This letter concluded, viz; "we will appreciate it very much if you will attach this order to the papers you hold in the matter, as wer we are confident you would not object to taking care of this matter for us when you have received the amount due you. We took this matter up with Mr. Moble, who we understood negotiated the deal, and he assured us that this would be agreeable to you." With this letter appellant sent the assignment, executed by Basye directed to the First State Bank of Roselle, dated March which states: "I hereby assign to the J. I. Porter 20, 1921, which states: the house of the collins of Company of Stuttgart, Arkansas, my interest in the notes and 72 0 1 1 1217 1 1 1 1 5 5 mortgage amounting to \$9270.00, secured by 460 acres in Section Two, Township Four South, Range Five West, Morthern District of Arkansas County, Arkansas, which I put up with you to secure a loan of \$5000.001 to the amount of \$4060.00, together with interest from date at 10% as evidenced by a note of this amount in their possession". Appellee had considerable correspondence with the company with respect to its interest in this matter,

and never intimated that it would not recognize this assignment.

now willing to pay to the complete of the amount in it will the principal note exceeded by a. . . stays, and to this over the principal note exceeded by a. . . stays, and to this over the complete the collecteral scornity, which it wold, that the complete them then facts, know the acceptance that the total scorn the complete of that it would be consistent that the total acceptance that the somplete continued and lower camp the sould have profested its interest in that collected in the collecters.

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Appellant acceded to the wishes of appellee when it desired to End the about the new and 740 refinance its first lien and the instrument, which appellant executed set forth very fully not only the transaction of the in mint i 3 9 91 TIVE several parties from its inception, the status thereof at 1.7 4 25 30 that time as well as the proposed refinancing plan and specifically made reference to the assignment by Basye to appellant, of his or state of the st equity in the collateral held by appellee. All the parties underlistic of stood that this collateral was held by the bank not only to protect bs 938 223 13 its loan by of \$5000.00 to Basye, but also, to proper the indebtedretain the a count we'r alater - 3 41 ness of Basye to appellant. No direct notice to the company, 7. . stion to it is in the by letter or otherwise, was given to appellant of the pendence . To distroct 1 11. . 8. 1 20 of this foreclosure proceeding. Constructive notice in accordance with the statute was given, but a defendant, who is not served with summons or with a copy of the bill, or who has not received a copy of the notice required to be sent him by mail. may file a petition within three years and be permitted then to file supplies of sold name dos we orin an answer and have a hearing as though he had been personally served. Smith-Murd Revised Statute 1927, Chapter 22, Section 19. The evidence discloses that the first notice appellant received of this proceeding was when its president wrote to appellee. making an inquiry about when a remittance might be expected to recover the amount due it and appellee replied that it had previously instituted foreclosure proceedings and had caused the collateral, which it held, to be sold under a decree, and that there was no amount to be paid to appellant. Upon receipt of this information, appellant immediately sent a representative to Wheaton to make an investigation and it then, for the first time, learned that Franzen, the Cashier of appellee, had become the purchaser of the collaterals for \$5234.75, being exactly the amount of debt of appelles, together with interest and costs. The evidence further discloses that the collateral notes were paid in full at their maturity, and that as a result of the transaction, either appellee or its cashier profited by the transaction, in excess of \$5000.00. Both had full knowledge of the slaim of appellant. Ash and Cox were solvent and successful business men, and appelled and its cashier knew this. The collateral, which appelled held, was good and appelled and its cashier

or fortish it rear solfe of an educate the island as a decision and Appellant fraction of the that the nell fail all engine ert he militarious sit wint that after wary abust tes out make soveral parties from its incorpion, the sta we or weed at til militrat has and taleralies become eds as flow as each tast said reference to the carigue at by a area to republist, at is equity in the collaboral head by appelles. Il the partire items. stood that this sollateral was wold by the foot and this to proves its loan am of \$3000.00 to busys, but wise, to proced the indebredness of Amere to appeliant. He direct netice to but years we by latter or othervise, were given to engineer to rea mendence of this ferecivenes recodeding. Constructive ration is recommend with the statute has given, but a definal, it, and is not correct with murrous or with a copy of the bill, or we are not reseived a copy of the notice routined or be need alo ent to you a file a polition diala teres pouro ani le consisted tran to tile will soon with more has a firm this per untired a sweet bus wayers may are more and the first provided bearing and editor aboves The evidence itsurage with the trail solders and solders are tree and of this prosecting with when its provident errice to smaller, mering an inquiry store year a . It invocation to expected to Las 31 d ma bell er sellegge ham 31 aub derene ent méveers hearns for in agrifeneous same franciscul seimideri ylunotverg the collected a recent bloc of od abira it decar a acceptable odd that there was no cooper to be gaill to threat its. There are the colors of the interpolation of the first description of the colors of th the commence of the transfer the control of the part of the control of tine, learned ter transfer to the in item of age to the med the med them. the arrest ser of side sol of the list side difficilly become the the scount of done of any long to the tamore wit esace. The officer's trades of a weekly and artistic economic on the second the five office of the process of the agent and the light of the experience of the contract of The series of the contract and the series of nin compaint fire on the algacop. The some at actions

knew that a sufficient amount could be realized therefrom not only to pay appellee the amount that was due it, but to pay the claim of appellant in full. Shortly after appellant consented to the plan of refinancing, appellee filed its bill and caused the collateral, which it held, to be sold to its eashier. Inexcusable had faith upon the part of appellee toward appellant is disclosed by the undisputed facts in this record and it would be most inequitable to permit appellee, or its eashier, to retain the amount which in equity and good conscience belongs to appellant. The order confirming the original decree was erroneous.

The decree of the Circuit Court is reversed, and the cause remanded to that court with directions to enter a decree in favor of appellant, and against appellee, and for an accounting to ascertain the amount which may be due upon the Basye \$4060,00 note held by appellant company and for payment by appellee of said amount due on said note to the J. I. Porter Company.

Reversed and Remanded with directions.

mew that a cufficient amount could be religed verofree net only to pay appelled the arount that was due it, but to pay the claim of appellent in full. Therely after appellent corrected to the plan of refinancing, appelled its bill end course the collateral, with it held, to be sold to its cabier. Intercorable had fulth upon the part of empelles to mrd appellent it displaced by the undisplaced facts in this vectal and it outs be root ine patient appellent to be root ine patients appellent to par it appelled, or its sauhier, to retain the match the cultive and your exercisors enleave to appellent. The enter confirming the original decree was errongous.

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STATE OF ILLINOIS,	]
SECOND DISTRICT	I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
and for said Second Distric	et of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the f	oregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in	my office.
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty-
(53761—3M—7-27)	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present-The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Mon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff

255 I.A. 639

BE IT REMEMBERED, that afterwards, to-wit: On OCT 19 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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radord, and auton APPELLATE COURT OF ILLINOIS

sed with the board, Second, District

May Term, A. D. 1929.

Frank Pavlik, Assignee of George business as Pavlik Brothers,

VS.

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determination is an c Joe Menoni and Egidio Mocogni, doing business as Menoni and Mecogni. word m was the Appellees. ) if the state is the state of the state of

gommitted, by a ratio in the Alla, the Land

Appeal from the Circuit Court of Lake County. 

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on or about origin OPINION by BOGGS, J. Seri spin se.

he was engaged for a let --- which is the contraction,

house totan action in assumpsit was instituted by appellant : against appellees in the Circuit Court of Lake County, to recover a balance of \$796.68, alleged to be owing by appellees to appellant for certain labor performed and materials furnished appellees. Summons was duly served, returnable to the October term, 1928. tion on in the ness in the

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diligent scerca il 1928, appellees were defaulted, damages were assessed against them and judgment was rendered thereon, On December 19, 1928, appellees made a motion to vacate said judgment, which motion was denied. On December 20, notice thereof a ortrost and the number having been given, appellees again moved said court to vacate intended to alas, said judgment. Thereafter, on January 5, 1929, being one of the mertian or tion the ulio regular judgicial days of the December term of said court, said urive baen urtrer motion was allowed; and an entry was made ordering said judgment OLLES PROUNTS FLU vacated, execution stayed, and giving appellees leave to plead Appellant elected "to stand by the judgment within three days. heretofore entered in said cause" and prayed an appeal to this court.

It is contended by appellant that, the term at which said judgment was rendered, having ended, the court was without juriadiction to vacate said judgment.

Appeal from the Gircuit Court of

Lake Sourer.

In The

## APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1929.

Frank Pavlik, Assignee of George Pavlik and Roy Pavlik, doing business as Pavlik Brothors, Appellant,

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Joe Menoni and Egidio Mosogni, doing business as Menoni and Mecogni,

Appelloes.

OPINION by BOGGS, J.

An action in assumpait was instituted by appellant against appellees in the Circuit Court of Lake County, to recover a balance of \$796.68, alleged to be owing by appellees to appellant for certain labor performed and materials furnished appellees. Summons was duly served, returnable to the October term, 1928.

On October 11, 1928, appellees were defaulted, damages were assessed against them and judgment was rendered thereon. On December 19, 1928, appellees made a motion to vecate said judgment, which motion was denied. On December 20, norice thereof having been given, appellees again moved said court to vacate. Said judgment. Thereafter, on Jenuary 5, 1929, being one of the regular judgicial days of the December term of said court, said motion was allowed, and an entry was made ordering said judgment vacated, execution stayed, and giving appellees leave to plead within three days. Appellant pleoted "to stand by the judgment beretofore ontories days, Appellant pleoted "to stand by the judgment of the forest and sayed, and stayed and speed to this court.

Section 89 of the Practice act provides, among other have a good delenge to the left of the late. For this, things:

"The writ of error coram nobis is hereby abolished, and not release of the little of the proceedings of eny court of the the proceed not not the proceedings of eny court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five appellant. An affiliation of final judgment in the case, upon which states agent ther triangle of the court in the case, upon which states agent there triangle of the court in the case, upon which states agent there triangle of the court in the case, upon reasonable notice."

It therefore follows that, upon proper showing, a judgfor and appearance, plea and all factors. The question for
ment may be set aside at a subsequent term. The question for
have been fired by appealance and that a first of the first of

motion was made by J. A. Miller, their attorney, and states that he was engaged "by them to enter an appearance" in said cause; "that on or about September 20, 1928, he had prepared an appearance, a plea and affidavit of merits, and that he took said papers to the court house, intending to file the same in the office of the circuit clerk in the above entitled cause; that at the time he had several other papers and office files in his passession, and that he believed said papers were filed in the office of the clerk, but that "mrors in dart, econsitted in the process of the the same do not appear to be filed of record, and if the same court of raward, and waith of the manner is the were not filed, then the same have been lost; that he has made diligent search in his own office and in the clerk's office, and error was countited, by action in artitude. that he is not able to find said papers, except his own office supra, 157. copy, and that, accordingly, he has prepared pleadings which are a correct and true copy of the original pleadings which he she proceeding it which the judges to stage to the same and the intended to file, thought he had filed, and now states on informaytism mation and belief that the same were filed, but that they have been lost; affiant further states that, relying upon his quastion of last, rist, was the country of the production of last, risk and the country of the office records and upon his personal recollection of having filed pleas for the defendants, he has answered the trial call in the above entitled cause, appeared and has stated that the defendants were ready for trial, and had no knowledge that his plea as attorney for said defendants was not on file until within the last few days when an execution was served upon said defendants and they advised this affiant that said execution had been served upon them; that the said defendants as this affidant verily believed

Section 89 of the Practice ast provides, among other

things:

"The writ of error corem nobis is hereby abolished, and all errors in isst, sommitted in the proceedings of any court of record, and which, by the cormon law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, male at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

It therefore follows that, upon proper showing, a judgment may be set aside at a subsequent term. The question for determination is as to whether such proper chewing was made.

The affidavit filled by appelless in sapport of said motion was made by J. A. Miller, their attorney, and states that he was engaged "by them to enter an apportance" in said ocuse; "that on or about september 20, 1928, he bud propered an appearance, a plee and affidavit of merits, and that he took seid papers to the court house, intending to Ille the same in the office of the siroutt clerk in the chove entilled canne; that or the time he had several other papers and effice illes in his possessim, and that he believed said papers were filed in the office of the clerk, but that the same do not appear to be filed of record, and if the same were not filed, then the same have been lost; that he made diligent search in his own office and is the election office, and that ne is not able to find crid papers, except his own office copy, and that, accordingly, he has prepared pleadings which are a correct and true cony of the original placedings which me intended to file, thought he nad filed, and now states on informagazian mation and melish that the same were tiled, but that they have been lost; affiant further seases that, relying upon his ofrice records and upon his personal recollection of having filed pleas for the defendants race as answered the trivial and in the above entitled ocuse, appeared and has stated that the defendants wers ready for trial, and had no spoyledes that his ples as attorney for soid defendents was not on file until within

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have a good defense to the plaintiff's claim; that they paid a sum of money which was accepted in full settlement, satisfaction and release of the plaintiff's claim before suit was started and that the judgment recovered by the plaintiff should be vacated, set aside and held for naught," etc.

appellant. An affidavit was filed by theattorney for appellant, which states among other things that said attorney has made a diligent search in the office of the circuit clerk of said county for said appearance, plea and affidavit of merits alleged to have been filed by appellees, and that he "cannot find that any papers were filed by defendants or defendants' attorney, prior to the motion to vacate judgment, filed December 19, 1928, which was after the end of the October term."

while the write of error coram nobis was abolished by the statute above quoted, yet, "it did not abolish the essentials of the proceeding, which in nature remains the same." Mitchell v. King, 187 Ill. 452-457; Domitski v. American Linseed Co., 221. Ill. 161-164. To the same effect is Smith v. Fargo, 307 Ill.

court of record, and which by the common law could have been corrected by said writ, may be corrected by the court in which the error was committed, by motion in writing." Mitchell v. King, supra, 457.

the proceeding in which the judgment sought to be set aside was rendered, and that, unless an issue of law is made upon the motion in the trial court, the question there passed upon is a question of fact, viz., whether the court in the former proceeding committed any error in fact." Domitski v. American Linseed Co., supra, 164/

"The motion provided for under the statute is the plaintiff's declaration in the new suit, to reverse or recall the judgment." Harris v. Chicago House Wrecking Co., 314 Ill. 500-505. To the same effect is Smith v. Fargo, supra, 304.

While counsel for appellant concedes that this proceeding is under section 89 of the Practice act, he insists

have a good defense to the plaintiff's claim; that they paid a sum of money which was accepted in full settlement, satisfection and release of the plaintiff's claim before suit was started and that the judgment recovered by the plaintiff should be vacated, set aside and held for naught," etc.

No answer to said motion was filed on hemalf of appellant. An afficavit was filed by the attorney for appellant, which states, among other toings that said attorney has made a diligent search in the office of the offcuit clerk of said county for said appearance, plea and affidavit of merits alleged to have been filed by appellees, and that he "cannot find that any papers were filed by defendants or defendants' attorney, prior to the motion to vacate judgment, filed December 19, 1928, which was after the end of the october term."

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"Errors in fact, committed in the propedings of any court of record, and which by the common law could have been corrected by said writ, may be corrected by the pourt in which the error was committed, by motion in writing." Altohell v. Ling, subtra. 457.

"The proceeding is one as taw, ond is independent of the proceeding in which the judgment graphs to be set solde as rendered, and that, unless on issue of let is and a unit the trial court, the question there passed approaching question of fact, viz., shelter the court in the first proceeding committed any error in fact." Domitski 7. American Linseed to., baconcept 12 or got at the first of the fact."

The motion provided for the state is the plaintiff's declaration in the new state, to reverse or recall the again.

that the showing made by appellees is not sufficient. The sufficiency of the motion or affidavit was not raised in the trial court, either by demurrer to the evidence or by motion in arrest of judgment, and was not raised in this court by assignment of error. The objection made in the trial court to the allowance of said motion is in substance the statement made by counsel in open court: "If he has not filed his appearance and plead, as a matter of law he is not entitled to open up the judgment. The term has gone by and he cannot open it up!."

by motion in the nature of a writ of error coram nobis, where it involves or constitutes a matter of fact, unknown to the court at the time the judgment was entered, and not appearing upon the face of the record, and which, if known, would have precluded the rendition of the judgment. People v. Niman, 276 Ill. 430-434; warner v. Wende, 214 App. 431; DiMeo v. Hines, 229 App. 486; Nogle Co. of Illinois v. Cunningham, 231 App. 154-158; Ness v. Bell, 246 App. 79. In the latter case, this court, after quoting the above mentioned statute, at page 83 says:

"Under this section, a misprision of the clerk in failing to enter and continue a motion to quash an attachment, which resulted in the entry of a judgment against the defendant, without neglect on his part, was an error in fact which did not appear of record, and warranted the setting aside of the judgment."

Citing Warner v. Wende, supra.

In Smith v. Fargo, supra, the court, in discussing the question of the sufficiency of the motion, evidence, etc., in a case of this character, at page 304 says:

is not word. The or or of the "The questions here raised were considered in the case ties, were a time for . I s 12 - 1. 32 of Domitski v. American Linseed Co. 221. Ill. 161. That was a 77 tal most for 000613 proceeding under what is now section 89 of the Practice act, to vacate and set aside a judgment previously rendered. The complaining party filed his motion for that purpose, setting up the reasons relied on. It does not appear that the opposite party filed anything in reply, but objected to the motion on the ground the term at which the judgment was rendered had expried, and the court had no jurisdiction. Affidavits were read in support of the motion, to all of which a general objection was made. The court sustaine .

that the snowing and by aprelia is in not marithent.

Butfieldney of the motion or affident has not related in the critical court, either by demirrer to the evidence or by office in the rest of judgment, and was not related in this court in arsimont of error. The objection nade in the trial court in the alto rnos of sair ablion is in substance the atteacht made by counsel in open court: "If he has not riled his appearance end grant of an atter of law he is not entitled to open by the judgment. The term has gone by and he cannot open by the judgment. The term has gone by and he cannot open it by."

"A ringision of the eleventy property to rows of the start of every part where is a involves or constitutes a latter of thet, uniform to the every start involves or constitutes a latter of thet, uniform to the every upon the face of the face the judgment was substant, and would have preclaimed the rendition of the judgment. Feople v. Liman, 271 Hil. 157-154; warner v. Tende, 211 App. 451; bidso v. Times, 275 App. 486; Mogie Co. of Hilanus v. Suraturas, abi App. 114-103; Elek U. Sell, 246 App. 75. In the latter case, this court, alter oncling the above sentioned starts, at page 36 says:

"Under this section, a mispreador of the of the familiar to enter and continue a notion to green an indication, which means the entry of a judgment against the determine, which and the part, which drop in his part, which drop in his a natch did not up our of record, and warr need the obtaing asine of his judgment."

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In Smith of serge, suche, the sourt, on risherful was question of the sufficiency of his other on, when of this others, at page but area:

The questions here raised ore armshered in the considered in the consideration of Domitski v. Provious Languel Co. 621. 111. 161. The sase normanders whit is the section 60 of the construction of the consideration of the consideration of the consideration of the construction of the con

the motion and vacated the former judgment, to which exceptions were taken. \* \* \* The plaintiff in error in that case contended in this court that the motion did not, on its face, disclose any error in fact, and that the court erred in assuming jurisdiction of it. The court held that was a question of law, which should have been saved in some appropriate way recognized by law. As that was not done and no motion in arrest of judgment was made, the question whether the motion on its face disclosed any error in fage was not preserved for review. It was also urged in that case that the matters set up in the affidavits filed in support of the motion were not such as to justify annulling the judgment for error in fact. On that question the court said, if it was desired to present the question as one of law whether there was any evidence to sustain the order and judgment it was necessary to demur to the evidence or by some other mode call for a ruling by the trial court on that question. Such course is necessary to preserve the question as one of law even though there is no conflict in the evidence upon which the trial court based its finding. Plaintiff in error did not follow this course. Therefore the question whether the affidavits, or the matters therein contained, proved any error in fact in the former proceedings cannot be considered here.X'"

In this case no answer was filed to said motion, the evidence was not demurred to, and no motion in arrest of judgment was made. The sufficiency of the motion or of the affidavit in support thereof, even though the same be entirely insufficient, is not submitted for our determination. Under the above authorities, there is therefore no question of law ofoof fact presented by this record for our consideration.

The judgment of the trial court will therefore be affirmed.

Judgment affirmed.

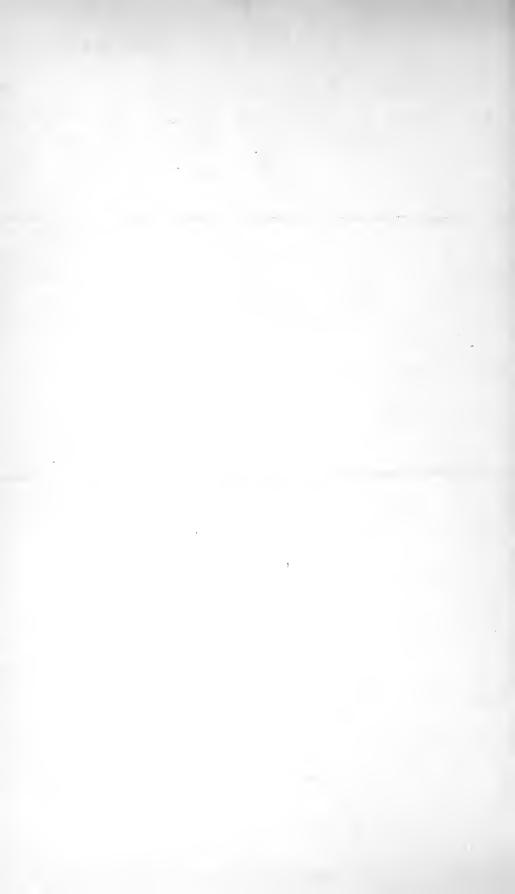
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The judgment of the trial court will where love se affirmed.

Judgmans affirmed.

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STATE OF ILLINOIS,	88.
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
	of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the fore	egoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my	
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty-
	Clerk of the Appellate Court
(53761—3M—7-27)	Clerk of the Appendic Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 639<sup>2</sup>

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 15 1920 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

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General No. 8105

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Agenda No. 16

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and I for any Frappellate Court of Illinois

Second District

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BERTHA GLAFKA, Appellant,

THE SIN BUT SON

CITIZENS STATE BANK OF WALNUT, and JOHN L. APPLEN, Sheriff of Bureau County, Appellees.

Appeal from the Circuit court of Bureau County

fruit we are the opinion by Bogos, P.J.

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On February 20, 1925, Edward J. Glafka gave to appellant, his mother, a chattel mortgage on certain horses, harness, cows, machinery, etc., to secure a note of \$8,000, due march 1, 1930. On February 22, 1929, a judgment was entered in the circuit court of Bureau County against the said Glafka and one Henry J. Lang, his father in law, for \$669.47. An execution thereon was levied on the property covered by said chattel mortgage on March 23, 1929. Appellant gave notice for trial of the right of property as provided by statute. A jury was waived and a trial was had, resulting in a finding and judgment in favor of appellees. To reverse said judgment, this appeal is prosecuted.

The mortgage given to appellant, being to secure a note falling due more than three years after date, would not be good as against judgment creditors having executions levied on said property, unless the mortgagee had taken possession of the mortgaged property. Appellant recognizes this rule, but insists that she had taken possession as of said property prior to the levy.

It was stipulated on the trial that appellant had delivered the chattel mortgage in question to one D. F. Conklin, a constable of said county, with instructions to foreclose the same. In The
APPELLATE COURT OF ILLINOIS
Second District
OCTOBER REEM, A. D. 1929

BERTHA GLAFKA, Appellant,

-2V-

CITICAUS STATE BANK OF TAINUT, : and JUHN L. APLICA, Shoriff : of Bureau County, Appellees. :

Appeal from the Sircuit court of brresu County

OFINIW by B'GGS, P.J.

On Feb mary 20, 10th, Edward J. Glafka gave to appellant, his mother, a chattel mothers on certain norses, harness, cows, machinery, etc., to secure a note of 10,000, due sared i, 1360. On February 21, 1381, a judgment was antored in the circuit court of suresu County against the said Glafka and one Henry J. Lang, his father in law, for lowled. An execution thereon was levied on the property covered by suid anatted mother on Derek 25, 1320. Appellant gave notice for trial of the right of property as provided by statute. A jury was writed and a trial of a necestres resulting in a finding and interpret in layor of aspelless. The reverse said judgment in layor of aspelless. The reverse said judgment, this appeal is presented.

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Conklin testified:

"On the 20th of March I started out there (to the farm occupied by said mortgagor) and met Mr. Glafka on the road. I got out and served the notice on him and asked him if the property was there and he said yes. I told him what I was going to do and he said, 'Go ahead and take the papperty,' but he would go to Princeton and stop it. I then tacked up the notices and went back to town. and I went out again that evening and asked him if he would do the chores if I would pay him for it, and he said he would. \* \* \* I went out to his place every day, the 20th, and the 21st and the 22nd, and on Saturday, the 23rd, the sheriff came and served the papers and took the stuff away from me. I went out and looked over the place and looked after the chores, and one afternoon I was out there all afternoon. On the 20th or 21st of March he (Glafka) asked permission to use a part of the property, and asked me if he could use the team, and I told him to go ahead and use it, it was all right with me if he wanted to use it and took good care of them. That was on the 20th or 21st, he had some timothy seed and wanted to haul out some fertilizer on the fixed. The weather got bad and he didn't use them and the sheriff took them away from him on Saturday."

This witness further testified that Glafka rendered him a bill for the feed given the stock, and for his work in taking care of the same.

Flaherty, the deputy sheriff who served said notice, testified: "I received a notice and took it to walnut and gave it to Dell Conklin. I told him I was sent up there with a writ and execution on Glafka and a notice of levy on the property. \* \* \* I levied on this property. I appointed a custodian, Henry Lang was the custodian. I don't know whether he took possession of the property of or not."

The testimony on behalf of appellees consisted of the testimony of John L. Applen, the sheriff, and of Henry J. Lang. Applen testified that he gave the execution on said judgment to his deputy Flaherty; that at that time the condition of the roads in that community was very bad; that he got stuck in the mud; that he moved the property in question from Glafka's place on March 25. Langa testified: "On the 25th of March I moved the stuff. The sheriff told me to move it it."

In rebuttal, one George Short, cashier of appellee bank, testified that Conklin posted in the bank notices of sale under

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"On the 20th of March I started out there (to the farm occupied by seid mortgagor) and met mr. Glafka on the roud. I cot out and served the notice on him and asked him if the property was there and he said yes. I told him what I was going to do and he said, 'Go ahead and take the parperty,' but he would go to Princeton and stop it. I then tacked up the notices and went back to town. and I went out again that evening and asked him if he would do the chores if I would pay him for it, and he said ne would. \* \* \* I went out to his place every day, the 20th, and the 21st and the 22nd, and on Saturday, the 25rd, the sheriff came and served the papers and took the stuff away from me. I went out and looked over the place and looked after the chores, and one afternoon I was out there all afternoon. On the 20th or 21st of March he (Glafka) asked permission to use a part of the property, and asked me if he could use the team, and I told him to go sheed and use it, it was all right with me if he wented to use it and to k good care of them. That was on the 20th or 21st, he had some timothy seed and wanted to haul out some fertilizer on the fixed. The weather got bad and he didn't use them and the sheriff took them away from him on Saturday."

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said foreclosure proceeding. He further testified: "I had already been informed that she had started foreclosure proceedings. I knew before the 20th of March that Mrs. Glafka had started to toreclose her mortgage on this property."

The foregoing is in substance the testimony heard by the court on said trial. The question therefore for determination is whether appellant had taken possession of the property in question, so as to preserve her mortgage lien as against the judgment of appellee bank.

If a mortgagee take possession of mortgaged chattels, before any other right or lien attaches, his title under the mortgage is good against everybody, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity. Chapron v. Feikert, 68 Ill. 284-285; Frank v. Miner, 50 Ill. 444-448; Springer v. Lipsis, 209 Ill. 261-263; First National Bank v. Barse Commission Co., 198 Ill. 232-233, citing McTaggart v. Ross, 14 Ind. 230; Brown v. Webb, 20 Ohio 322 389.

"No particular mode of taking or retaining possession is required. It is not necessary that the property be delivared to the mortgagee in person-delivery to an agent is equally effectual."

First National Bank v. Barse Commission Co., supra; Williams v.

Head, 219 App. 5;11.

"No removal of the property from the mortgaged premises is essential, if the mortgagee has actual control of it there."

Jones on Chattel Mortgages, sec. 180; First National Bank v. Barse

Commission Co., supra, 253; Williams v. Head, supra.

"What constitutes a change of possession depends upon the character and situation of the property." First National Bank v. Barse Commission Co., supra, 253; Williams v. "ead, supra, 11.

It is insisted by counsel for appellee bank that, as the property in question consisted of live stock, farm machinery, etc., and inasmuch as appellant did not remove said property from the farm occupied by said mortgagor, there was not a sufficient taking of possession as against the execution of appellee bank. Under the above authorities, it is not necessary in all cases to remove property covered by a chattel mortgage, even though it may consist of live stock.

In First National Bank v. Barse Commission Co., supra,

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"No perticular code of waing or metalohy possection is relatived. It is not desectly the vide projectly be delivared to the mortgage in serving delivery so an apair is a will offectual." First Beticual hank v. 1978 formilatio out, copy; dilli as v. nead, 213 app. 3;11.

"ho removal of the property from the contract premised in easenthel, if the contract and sature control of to there." Jones on the their fortgages, and the first faith the control of the garse Commission do., supra, had, chiling a mark, shows.

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the chattel mortgage taken by the Barse Commission Company purported to cover 2,100 head of cattle, being all of the cattle owned by the mortgagor, "located in my pastures near waggoner, Greek Nation, Indian Territory, and to be fed and grazed in said Greek Fation until shipped to the order of George R. Barse Commission Co." The mortgagee, becoming convinced that there was not the number of cattle in said pastures named in said chattel mortgage, elected to take possession of said cattle. The mortgagee was represented in this matter by one Stonebreaker, who employed one Redmon, a former foreman of the mortgagor's, to take charge of said cattle for the mortgagee. Stonebreaker himself was out at the ranch from time to time and assisted in cutting out the catile for shipment, etc., but when he was not there, kednon was in charge of the cattle. The cattle were not taken from the pastures in which they were located at the time they were mortgaged and, as stated, Redmon had been the foreman of the mortgagors on said ranch, in charge of said cattle, up to the time of his employment by the mortgagee. The court held that the possession taken by the mortgages was sufficient.

In this case, appellant had ordered the foreclosure of her chattel mortgage; the constable at once served notice on the mortgagor and the mortgagor told him he could take possession of the property; ne at once posted notices for the sale of said property, xx one of said notices being posted on the farm where the property was located, and one was posted in appellee's bank, giving notice that the sale would take place on the farm. Mr. Short, the cashier of appellee bank, testified with reference to the posting of the notice in the bank, and also that the mortgagor had, previous to that time, notified him that appellant was foreclosing said mortgagee. The evidence is also uncontradicted that Conklin was at Glafka's farm, where said stock and machinery was located, on the day Glafka was served with notice, and on each following day until appellee sheriff levied said execution, and until he had been served with notice by said sheriff. The acts of the constable, in going to the home of the mortgagor from day to day and looking after this property, and the posting of notices of sale, amounted

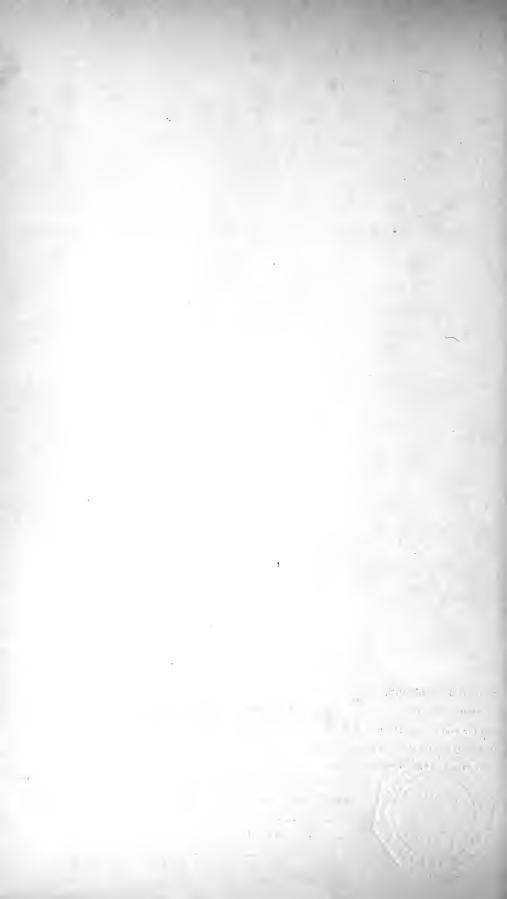
to a taking or possession, even though wid constrile may neve employed the sourt post to find about. In therefore note that the trial court post of in tinding the frames for sames one, and in requesting jungments appealent.

For the ressons above set forth, who interest of the tried sourt will be reversed and the cause ill be remained.

Revarsed and remanded.

STATE OF ILLINOIS,	
SECOND DISTRICT	I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
and for said Second Distric	et of the State of Illinois, and the keeper of the Records and Scal thereof,
do hereby certify that the f	oregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in	my office.
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty-

Clerk of the Appellate Court



## AT A TERM OF THE APPELLARE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 639<sup>3</sup>

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 15 (200) the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:



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> in Trie APPELLATE COURT OF ILLINOIS

> > Second District

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EVA FRIDAE, Appellant,

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MIKE FRIDAE, Appellee. ) ..... Will County. 001100

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Appeal from the Circuit Court of

A CONTRACTOR OF THE CONTRACTOR

OPINION by BOGGS, P. J.

m' - It I Let A bill was filed in the circuit court of will County by appellant against appelles, setting forth that said parties were intermerried on Jenuary 16, 1926; that "on or about the 25th day of February, A. D. 1926, the said Mike Fridae willfully deserted and absented himself from your oratrix, his wife, without reasonable cause, and persisted in such desertion from that time forward for the space of two years and still continues to so absent himself." praying that said marriage relation be dissolved, etc. To said bill, appellee filed an answer, denying said charge of desertion, etc. A trial was had, resulting in a finding in favor of appellee, and a decree was entered, dismissing said bill for want of equity. 2 To reverse said decree, this appeal is prosecuted.

s yas Said parties were married on January 16, 1926, and lived together some six to eight weeks, the exact time being more or less indefinite. At the time of their marriage, said parties were about fifty-seven years of age. Appellant had been previously married, and had by her first husband sixteen children. The evidence on the part of appellant consisted of her own testimony and that of her two sons, who were living in the family. Appellant was of Polish descent, and testified through an interpreter. Among other things, she stated that; "He (appellee) didn't treat ber

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A bill was filed in the sirault court of the state of y appellant arminst aposites, setting horth that state of a setting were intermetried on denuty 16, 1964; the "os or e out the "old lay of imbrary, 4. D. 1975, the said sixe ridge silt in dense of inside the dense of and absorbed almost from "d. or this, six wite, without reservant of our se, and persist d in quel issaid or house and the time of the second sixe sixe of the second sixe, is the second sixe of actions of the second sixe, is the second sixe of actions of the second sixe, is the second sixe of the second sixe, and the second sixe, and the second sixe of the second sixe, and sixe, and the second sixe, and the second sixe, and the second si

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right, beat her. \* \* \* That he drink continually and whenever he was drunk he would beat her. \* \* \* That when he got drunk he beat her and go away and then come back with an excuse that he was sick or something like that. He left me. \* \* \* He didn't say nothing when he left. He said he will fix her or he will show her yet. \* She further testified that, after he left, "He never offered me anything."

garage built, that they did not agree with reference thereto, and that appellant's sens had something to do with the controversy.

Appellant testified: "I went into the bedroom and told him (appellee) that if he didn't go to work he could get out of there.

He left four days after that." She was asked by the court if she gave appellee his clothes and told him to get out. She answered:

"When he had the clothes together she saw him out in the automobile, ready to leave. "" She didn't say nothing; he just says he is going to fix her." She further testified: "I don't want to live with Mike Fridae now. I am too old. My two boys were living with me and Mike at the time of the separation. One boy was 21and one was 25. \*\* \*\* Boys did not want him around, but they never did threaten to throw him out."

Appellant's son John testified: "After they were married he (appellee) was all right, I guess, for about three or four days, and then he got drunk, and a lot of abusive language, and threatened her. "Of course, I never saw nim strike her, but he threatened her planty of times." I was there the day Mike Fridae left. My mether told him when he is ready to come back and behave himself, why, all right; but he has got to come back reformed; that she couldn't live with him under the way he is going." On cross examination he testified: "I never liked Mike Fridae.

lived together, Mike was drunk most of the time. One day he tried to beat her. He said he was going to xill her with an ax."

He further testified: "I didn't want him (appellee) there, not the way he was treating mother."

The evidence on the part of appelles consisted of his own testimony and the testimony of one Anthony Clock, the man who

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was building the garage referred to. Clock testified that, during the time he was working on the garage, he are his meals at the nome of appellee and appellmnt; that on the day appellee left, he was cating his breakfast; that "Ara. Fridae mays to him that Mile will nave to move, and if Mike don't move, his bones will be broken. I wont out of the house then to build the garage; did not see anything after that; saw his clothes being pushed out on the porch; saw her push the things on the porch. Mike took them off the porch and went away."

Appelles testified that appellant, in discussing the matter of building the garage, said to him: "You are not going to be the boss here. You can't build the way you want it. You have to build it the way they want it (referring to her sons). \*\*

That was on Sunday. \*\* Monday norming they all get up and boys, one of them go to senool and one to work, and told me to get out of here, 'You will have to move, we don't want you here,! and then after the boys left then she come and told me than the same thing. The says, 'If you ain't going to get out I will break up your bones and throw you axe out on the street and let you die like a dog."

flu at the time, and that appellant did not bring him anything to eat; that "on Tedresday I get up and go to lock for a nouse; Thursday I told her I have got a nouse, she don't need to be worrying with me. She says, 'All right, get out,' and she take my clothes and shove them out. The says, 'You get out.'\* \* I told her, I says if she want, she has got the place with me any time she wanted to. I am willing to live with her now if she agree to it. I am willing to support her." Appellant further testified that he never struck or beat his wife, that he never was drunk during their marriage, and that he gave his pay checks to appellant for the short time they lived together. Appellant in her testimony admitted that she did receive his checks, and that out of them she gave him 2000.

The evidence is conflicting. If the testimony on the part of appellee and the witness Clock is to be believed, appellee was not guilty of deserting appellant. There are certain statements

what building the remains referently, as the first of the indices, and the the he as working so the previous, as the law approved as a supported for a subjection of approved as a subjection of the law approved as a subjection of the law and the first of the sense as the heaven all west out of the acuse the a addition of the consecution to a subject the proved and the first of the acuse the addition of the provest of the clothest being pushed out on the postal are great the things on the reces. The best and off the postal are

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Appealed further replicites in a continue of the time, and then apprehens to all as the time, and then apprehens to a look are only retent to assist and are to the control of the time and the apprehens to a record to the time and the apprehens to a reterminate and the cold near toward the areas, fill at the time, and then are the cold of the time and are to a time and are to a time and are to a time and a time and a time and a time and a time a time at a time and a time and a time a time at a time and a time a time at a time and a time are to a time at a time and a time an

in appellant's testimony and in that of her sons which go in corroboration of the testimony of appellee to the effect that he did not willfully desert appellant, but that his going was at the instance of appellant and her sons.

Where a husband or wife leaves at the request or with the acquiescence of the other, he or one cannot be charged with a willful descrition, within the meaning of the statute. Loftus v. Loftus, 134 App. 360-362. The law nurther is that if a husband or wife voluntarily does that which compels the other to leave, or justifies the other in leaving, then such leaving would not be descrition on the part of the one leaving. French v. French, 302 Ill. 152-161. The evidence being conflicting, we would not be warranted in reversing the finding of the chancellor, unless we are able to say that it is against the manifest weight of the evidence. Calvert v. Carpenter, 96 Ill. 63-66-67; Hoftman v. Hoftman, 316 Ill. 204-214; Burandt v. Burandt, 318 Ill. 218-226; Springer v. David Bradley Mfg. Co., 191 App. 45-59; People, ex rel Mirson, v. Magel, 243 App. 490-496; That we cannot do.

For the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.

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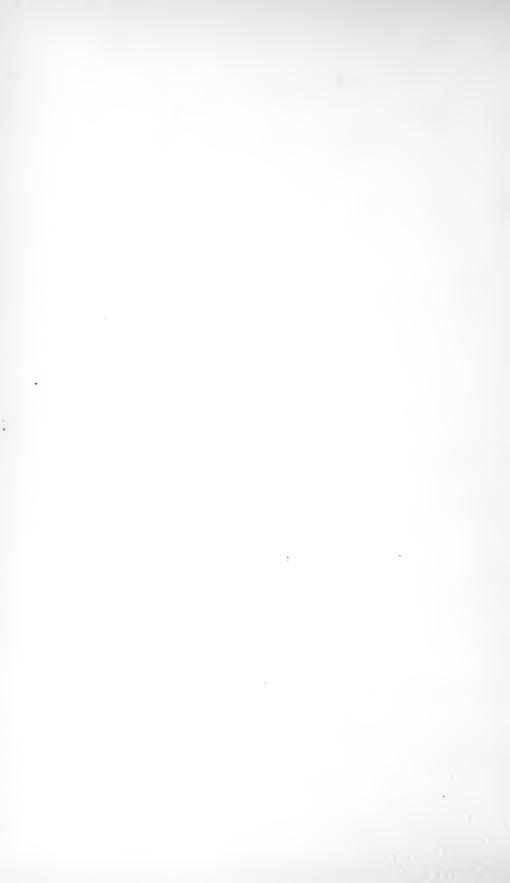
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STATE OF ILLINOIS,	\$8.
SECOND DISTRICT	I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District	of the State of Illinois, and the keeper of the Records and Seal thereof,
	regoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in r	ny office.
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty

Clerk of the Appellate Court



## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On NOV 11 1829 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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t sould find.

General Number 8137 Agenda 51

SARA P. McBURNIE, Appellee, :

ו' שורדנית ני arter at the second RALPH W. BAILEY, Appellant.

Appeal from the Circuit Court of reoria County 

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transferred to the first to the Boggs, P. J.

2 918 3 t On June 21, 1929, judgment by confession was entered \ in the circuit court of Peoria County in favor of appellee and tagainst appellant for \$1,707.57. On July 16, being one of the regular days of the May rterm; t1929, a motion was entered by ap--pellant to vacate said judgment into stay execution and for leave nto plead. Accompanying said motion was an attidavit, in which was stated, among other things;

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That the note sued on is a renewal note; that a former note was given by this defendant, malph N. Bailey, H. L. Emery and F. C. Cline, for the sum of \$1,500; that at the time said note was given, it was distinctly understood and agreed that said Halph N. Bailey should pay one-third of the principal and interest that might accrue upon the said note, and that the said H. L. Dmery and the said. F. C. Cline should each pay one-third of the said principal and the interest on the respective one-third cof he original note"; that the same agreement obtained with refermence to the note upon which judgment was taken, "that is to say, that each of them was to be individually liable for \$500 of said \$1,500 represented by the said note sued on, and the other two were todbe security for the payment thereof, and that, individually, inuitiaffiant was only primarily liable for one-third of the said note and the interest that would accrue thereon."

It was also stated in said alfidavit that, in addition to the 7% per annum interest provided for at in said note, there was a bonus agreement entered into by the makers of said note with appellee, which, it is contended, rendered said note usurious.

Appellee admitted the usurious character of the transaction, and entered a remittitur of \$195.07, reducing the

SAMA P. MOR H' 15, appellee,

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Anders are unrealt

Boggs, 2. J.

On June 21, 1923, jackesht by contaction at antiset and in the circuit court of rectic count, in takes of an allow case each exainst appellant for \$1,707.57. On ally le, bing we of the regular anys of the May term, 1929, a motion was entered by appellant to receive said indement, to stay a sample of its larve to plead. Accompanying said order as an alliant it, in only was attead, among other times:

"There was given by which dought, salph ". Sallog, J. D.

Tormer note was given by which dought, salph ". Sallog, J. D.

Emery and F. G. Gline, for the sun of place; which as the size suid note was given, it is a distinctly understood and derosal suid that said salph ". Deliey social pay one-trival of this principal and interest that hight accrus a on the said note, and said the said if, h. where and the said r. D. Oline thought each place the-third of the caid without are the said r. D. Oline thought each place third of the caid without at the said that or he of them with a delication and the said the said the said that or he of the presented by the said that on, it is a said the said that one only primitely liberty along the said the said

It was also stated in a sign a flassid made, in society on a section of the secti

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the amount of said judgment to \$1,534.50. It being practically conceded that the remittitur covered all interest collected on the original note and the interest included in the judgment herein, the court refused to stay the execution and to vacate said judgment. To reverse said order or judgment, appellant prosecutes this appeal.

It is contended by appellant that the matters and things set forth in his afficavit showed a meritorious defense to said note, and that the court should have vacated said judgment and given appellant leave to plead. On the other hand, appellee insists that to have so ruled would have been to allow a defense, the effect of which would have been to vary, by parol evidence, the terms of a written instrument.

As a general proposition, it is well understood that the terms of a written instrument cannot be varied or changed by a prior or contemporaneous parol agreement. This rule obtains with reference to promissory notes as well as to other written contracts.

Harris v. Galbraith, 43 Ill. 309-311; mosner v. kogers, 117 Ill.

446-453; Packer v. Roberts, 140111. 9-15; Mumiora v. Tolman, 157

Ill. 256-265; Moyses v. Schendorf, 228 Ill. 232-233; Travelers

Ins. Co. v. Mayo, 70 App. 627, affirmed in Travelers Ins. Co. v.

Mayo, 170 Ill. 498; Hensley v. mitchell, 147 App. 161-162; Western

Hat Works v. Pride Hat Co., 224 App. 243-250.

For the nisi prius court to have opened up said judgment and given appellant leave to make the defense set forth in
said affidavit, would have been to have varied the terms of said
note. Under the foregoing authorities, the court did not err in
denying said motion.

ceded that parol evidence of the character sought to be offered in this case were admissible, the showing made by the arridavit was not sufficient. In order to warrant the opening of a judgment by confession, for the purpose of allowing a defense to be made, the affidavit in support of the motion must show a meritorious defense. Desnoyers shoe Co. v. rirst National Bank, 188 Ill.

312-319; Moyses v. Schendorf, supra 233; Chicago & M. E. Ry. Co. v. Krempel, 116 App. 253-256. The affidavit in this case states that we hen said note was renewed by the giving of the note sued on,

the amount of said judgment to \$1.534.00. It being practically conseded that the remittitur sovered all interest collected on the original note and the interest included in the judgment wrain, the court rainsed to stay the execution and to vacate said judgment. To reverse unid, order or judgment, appellant proseentes this appeal.

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- ment and given appellant leave to make the deriense set Lorch in said suit first, rould burs be in so says varied the trans of said note. This bear so says varied the trans of said note. This burs the court did not err in dearing seld obtion.
- It wishs be further or the contractor sought to be edded out that the thet prod evidence of the character sought to be effered in whise case were edded, the abouting was not but it is not in order to verture the opening of a judgment by confession, for the judgest of allowing a cateria to be made of allowing a cateria to be made of the self were self were a fitted in support of the notion must above a meritorious at the africavit in support of the notion must above a meritorious at the single of the notion must above a meritorious and the self made. The support of the notion must above a meritorious and the selfense. The support of the notional bank, 188 III.

that the same agreement in reference to the payment by each of the respective parties thereto was entered into, that is to say, that each of them was to be individually liable for \$500 of said \$1,500 represented by the note sued upon, and the other two were to be security for the payment thereof." The effect of said affidavit is to show a primary liability of appellant for one-third of said note and a liability as surety for the remaining two-thirds. It does not, therefore, show a meritorious defense.

Some question was also made by appellant as to the right of appellee to take judgment by confession against him, without joining the other makers of said note. The note sued on provides among other things: "The Three months after date, I promise to pay to the order of sara r. McBurnie," etc. The warrant of attorney to confess judgment on said note is as follows: "And to secure the payment of said amount each of the undersigned do jointly and severally, hereby irrevocably authorize any attorney of any court of record to appear for him," etc. Clearly, both in the promise to pay and in the warrant or attorney, the makers of said note were to be severally liable for the payment thereof. Fersons severally liable upon a promissory note may all or any of them severally be included in the same suit, at the option of the plaintiff. Cahill's Ill. Stat., chap. 98, sec. 6; Glimes v. Ellars, 73 App. 553. All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable. Cahill's Ill. Stat., chap. 98, sec. 88. A promissory note executed by severall though joint in form, is joint and several, and the holder may resort to either of the makers for payment. Marine Bank of Chicago v. Ferry's Admrs., 40 Ill. 255.

In connection with the contention of appellant that the note in question is usurious, it is only necessary to say that, upon the remittitur above set forth having been made, the court would not have been warranted in opening up the judgment on account of the original ururious character of the transaction. Ralph v. Baxter, 66 Ill. 416.

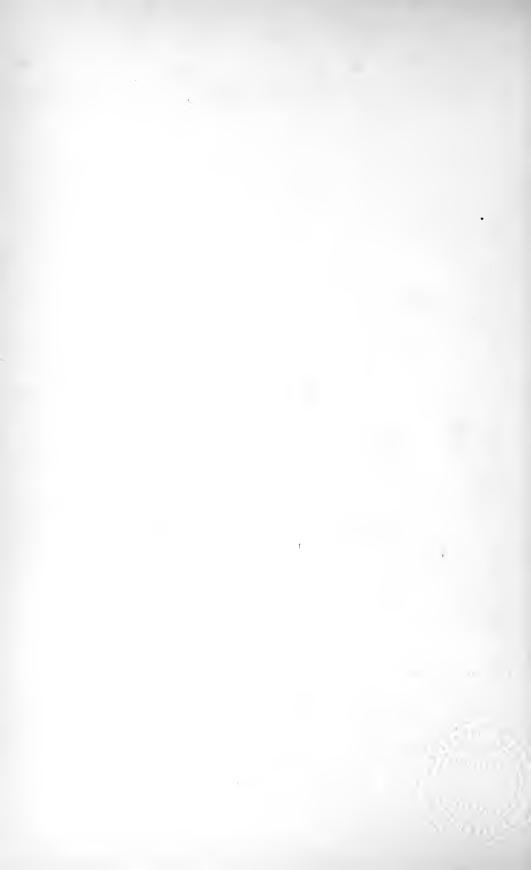
Finding no error in the record, the judgment of the trial court will be affirmed.

That the anne agreement in reference to be payman by the or crahe respective parts a increto was conscred into, and anyman as, the order of the was to be instructedly it one for anymark of animals. It can be the sentitly in one against the agains

their arm of the tail specit of the pull the definite smooth of appelled to take intement of notice and into Art. Atlant softwar me bot to at soil extra condition and the safety and building amore often thirty at the secret we extend in e. d. c. d. c. running of attorney pay-to the older of berd : at the end of war estimated a production of the second production of the second production of be a siderial on writing and on a second second number of them payed end The tree in a contract of the mental to a first the community of the partition and a partition of the company of the community of medical compactification of the compact of the contract of the compact of the com -vas and the same form of the profit and all set guilded year er or exer--ground and the second of the second of the entirely subcome althorated the first of the state of the sta Balanti Librara, and a transfer in the contract of the contrac offs of the desired and independent of them is a long Commence of the first of the fi Description of the control of the co of the second section of the property of the second second section The second of th 

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STATE OF ILLINOIS,	
SECOND DISTRICT	ss. I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District	of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the fo	regoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in n	
chiara du de e	In Testimony Whercof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	in the year of our Lord one thousand
	nine hundred and twenty-
	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT

Begin and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 639<sup>5</sup>



General No. 8004

Agenda 21.

THE PROPIE OF THE STATE OF ILLINOIS,

DEFENDANT IN ERROR.

ERROR TO THE COUNTY

DEFERDANT IN PRINCE.

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COURT OF WINNERAGO COUNTY.

V S. ROSIE WILLIAMS.

PLAISTIFF IN ERROR

Jett, J.

This cause comes to this court upon a writ of error, from the county court of Winnebago County. The same issue is involved in this cause as in People vs. San Filippo, General No. 7933, decided at the present term of this court.

The opinion in that case controls the decision in this case, and therefore the judgment of the trial court is reversed.

General 'o. 8004

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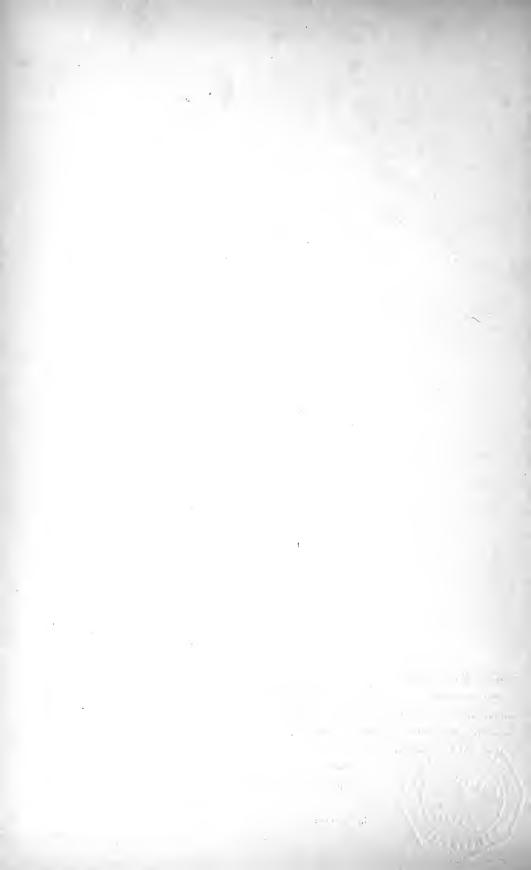
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Jett, J.

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the estimate in orders, essentially as estated in the trial court is the serious.

STATE OF ILLINOIS,	\ss
SECOND DISTRICT	I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
	of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the for	regoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in m	y office.
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty
	Clerk of the Appellate Court



AT A TERM OF THE APPELLARE COURT,

Regun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 640

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 1 13 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

General Number 8043

Agenda 12.

THE PEOPLE OF THE STATE OF ILLINOIS,

DEFENDANT IN ERROR.

VS.

ALEX WHITE,
PLAINTIFF IN ERROR.

ERROR TO THE COUNTY COURT

OF WINNEBAGO COUNTY

Jett. J.

This cause comes to this court upon a writ of error from the county court of Winnebago County. The same issue is involved as in People vs. San Filippo, General No. 7938, decided at the present term of this court.

The opinion in that case controls the decision in this case, and therefore the gudgment of the trial court is reversed.

Judgment reversed.

General 'umber 8043

Agenda 12.

ERROR TO THE COUNTY COURT

OF WINNEBAGO COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS,

DEFENDANT IN ERROR.

VS.

ALEX WHITE,

PLAINTIPF IN ERROR.

Jett. J.

This cause comes to this court upon a writ of error from the county court of winnebago County. The same issus is involved as in Papple vs. Jan Filippo, General No. 7938, decided at the present term of this court.

The opinion in that case controls the decision in this case, and therefore the gudgment of the trial court is reversed.

Judgment reversed.

STATE OF ILLINOIS,	
SECOND DISTRICT	I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
	of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the for	regoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in m	y office.
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty-

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 640<sup>2</sup>

BE IT REMEMBERED, that afterwards, to-wit: On NOV 15 1909 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

two endings of the

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in error,

vs.

WRIT OF ERRUR TO COUNTY COURT OF WINNEBAGO COUNTY.

JOHN SCHMIDT, alias JOHN SMITH, Plaintiff in error.

JUNES J.

This cause comes to this Court upon writ of error from the County Court of Winnebago County. The same issue is involved as in People v. San Filippo, Gen. No. 7938, decided at the present term of this court. The opinion in that case controls the decision in this case, and therefore the judgment of the trial court is reversed.

Judgment reversed.

## STATE OF ILLINOIS.

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in error,

vs.

JOHN SCHMIDT, alias JOHN SMITH, Plaintiff in error,

WRIT OF ERRUR TO COUNTY COURT OF WINNEBAGO COUNTY.

JUNES J.

This cause comes to this Court upon writ of error from the County Court of Winnebago County. The same issue is involved as in People v. San Filippo, Gen. No. 7938, decided at the present term of this court. The opinion in that case controls the decision in this case, and therefore the judgment of the trial court is reversed.

Judgment reversed.

THE PEOPLE OF THE STATES OF LLLINUIS, Defendant in error,

V3.

JOHN SCHMIDT, alias JOHN SMITH, Flaintiff in error,

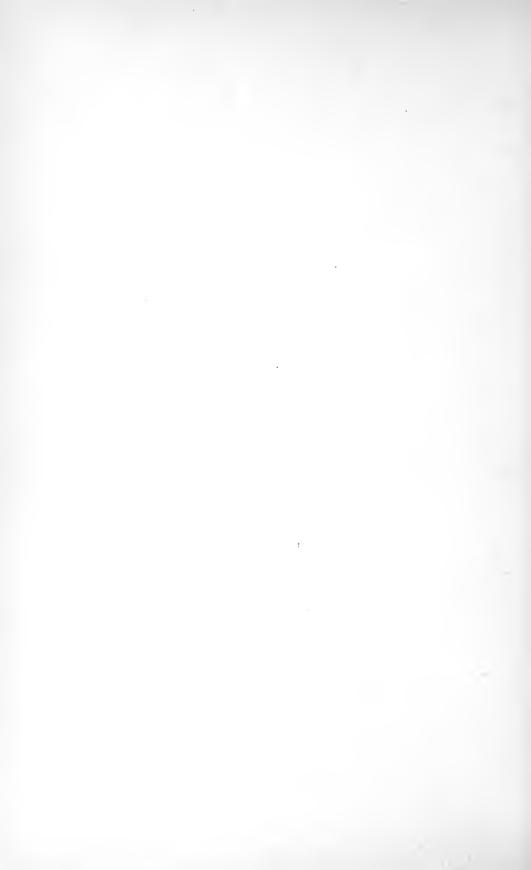
WRIT OF ERRUR TO COUNTY COURT OF WINNEBAGO COUNTY,

JONES J.

This cause comes to this Jourt upon writ of error from the County Court of winnebago County. The same issue is involved as in People v. San Filippo, Gen. No. 7938, decided at the present term of this court. The opinion in that case controls the decision in this case, and therefore the judgment of the trial court is reversed.

Jungment reversed.

2	
STATE OF ILLINOIS, SECOND DISTRICT	s.  I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
SECOND DISTRICT	I, JUSTUS 1 JOHNSON, Clerk of the Appenate Court, in
do hereby certify that the fore	going is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my	office.
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty-
	Clerk of the Appellate Court



AT A TERM OF THE APPEALATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

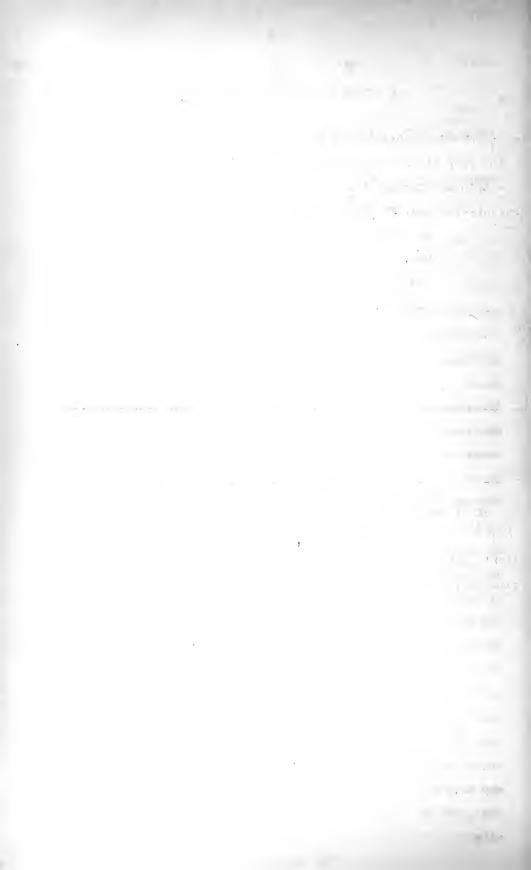
Hon, NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

 $255 I.A. 640^3$ 

BE IT REMEMBERED, that afterwards, to-wit: On NOV 15 in the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



SUSAN H. LEWIS, APPELLEE,

vs.

FARMERS' STATE BANK OF ATKINSON, ILLINOIS, a Corporation, et al, APPELLATTS, APPEAL FROM THE CIRCUIT COURT OF HENRY COUNTY.

JONES P.J.

Susan H. Lewis filed a bill against Edward w. Lewis. her husband, to foreclose a deed of trust given by him to secure the payment of a note for \$7,000. The bill alleged that default had been made in the payment of interest due in June. 1928: that there had been a failure to pay the taxes for the year, 1927, and that by reason of such defaults, complainant had elected to declare the entire debt due. It also alleged there are two senior encumbrances on the land amounting to \$19.500: that the premises are not worth the amount of the encumbrances: that the debtor has only a life estate in eighty acres of the land and is 58 years of age; that his expectancy is of little value; that he is indebted more than \$42,600 besides his debt to the complainant; that his personal property consisting of live stock, farm machinery, implements and growing crops has been levied on by the sheriff under executions in favor of judgment creditors for more than \$23,000; that a part of said personaly property is mortgaged for \$6,000; that the growing crops are in the custody of the sheriff, who has failed and neglected to properly care for them; that the personal property is not sufficient to satisfy the amount of the judgment and chattel mortgages; that the premises embraced in complainant's deed of trust are scant and insufficient security for her debt; that the debtor is hopelessly insolvent; and that the deed of trust provides that upon default by the grantor the trustee may take possession of the premises and collect all rents, issues, The bill also prayed for the appointment of a reand profits. ceiver.

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SUSAN H. LEWIS, AP RELEES,

VS.

FARMERS' STATE BANK OF ATKIHSON, ILLINOIS, a Corporation, et al, AFPELLANTS,

Jones P.J.

APPEAL FROM THE SIRSUIT COURT OF RENKY SOUNTY.

Susan H. Dewis filed a bill against Edward w. Dewis. her husband, to forselose a deed of truet given by him to seedre the payment of a note for \$7,000. The bill sileged that default had been made in the payment of intorest due in June, 1928; that there had been a failure to pay the taxes for the year, 1927, and that by reason of such defaults, complainant had elected to declare the entire dept due. It firs willered there are two senior encumbrances on the land amounting to \$19.500; that the premises are not worth the secont of the enoundrances; that the dector has only a life estate in eight; acres of the land and is 38 years of age; that his expectancy is of little value; that he is indebted more than \$42,600 besides his debt to the complainant; that his personal property consisting of live stock, farm machinery, inplements and growing cross has been levied on by the sheriff under executions in favor of judgment creditors for more than \$25,000; that a part of said personaly property is mortgaged for 50,000; that t e growing crops are in the custody of the sheriff, Tho has failed and neglected to properly eare for them; that the personal property is not sufficient to satisfy the amount of the judgment and chattel nortgages; that the premises embraced in son actinent's deed of trust are scant and insufficient security for her debt; that the abtor is hopelessly insolvent; and that the appl of trust provides that upon default by the grantor the trustne may take possession of the premises and collect all rents, is use, and profits. The bill also prayed for the appointment of a receiver.

of judgments against the defendant, Edward W. Lewis. On July 27th, a hearing was had upon the verified written application for the appointment of a receiver. No notice of the hearing was given to the appellants, but they entered their appearance and were present when testimony was heard. It is conceded that the evidence tended to prove the allegations of the bill.

The court thereupon entered an order finding that
Lewis is insolvent and has no property upon which there are
not liens exceeding its value; that the first liens on the
premises covered by complainant's trust deed amount to \$19,600
with interest; and that there is now owing on complainant's
trust deed, \$7,000 and interest. The order finds that the
premises are meager and scant security for the indebtedness,
and that a receiver should be appointed to take charge of all
crops and the premises, rent the land, care for and sell or
dispose of the crops. A receiver was appointed and his
bond fixed at \$3,000.

ceiver. The principal objection urged by appellants is that the order did not compel the complainant to give a bond to the defendants, conditioned to pay all damages sustained by reason of the appointment and acts of the receiver in ease of a revocation of such appointment, or make a specific finding that no bond be required. Section 54 of the Chancery Act (Chap.22, Rev. Stat.) provides that before any receiver shall be appointed, the party making the application shall give bond to the adverse party in such penalty as the Court or Judge may order, provided, that bond need not be required, when for good cause shown, and upon notice and full hearing the court is of the opinion that a receiver ought to be appointed without such bond.

It has been held that before a receiver can be appointed, a bond must be given by the complainant to the defendants, unless the order of the court appointing the receiver specifically finds that no such bond need be given. (Nat. Supply Co. v. Ill. Preserving Co., 239 Ill. App. 69; Ayres v. Graham S. C. & L. Co., 150 Ill. App. 137.) In the instant case, no bond was required

of judgments against the defendent, ddwerd w. Lewis. On July 27th, a hearing was had upon the verified written application for the appointment of a receiver. No notice of the hearing was given to the appeliants, but they entered their appearance and were present when testimony was heard. It is conceded that the evidence tended to prove the allegations of the bill.

The court thereupon entered an order finding that Lewis is insolvent and has no property upon which there are not liens exceeding its value; that the first liens on the premises covered by complainent's trust deed amount to \$19,600 with interest; and that where is now owing on complainent's trust deed, \$7,000 and interest. The order finds that the premises are messer and scant separity for the indebtedness, and that a receiver should be appointed to take conveye of all erops and the premises, rent the lane, once for and sell or orops and the greates, the takes appointed and sell or bond fixed at \$5,000.

Enter. The principal objection urged by appellants is that the order did not compaction urged by appellants is that the order did not complainent to give a bond to the defendents, conditioned to pay all desages sustained by reason of the appointment and acts of the receiver in case of a revocation of such appointment, or take a specific finding that no bond be required. Section of of the Chanceur hot (Gnap.22, Hev. Stat.) provides that before any receiver shall be appointed, the party making the application and t give bord to the adverse party in such penelty as the Court or Judge may order, provided, that bond need not be required, when for sood order, provided, that bond need not be required, when for sood order, provided, that bond need not be required, when for sood order, provided that a receiver ought to be appointed without soon bond.

It ims been held that before a receiver can be suppointed, a bond mist be given by the convlainant to ane defendants, unless the order of the court appointing the receiver specifically finds that no such and need be given. (Nat. Supply Go. v. III). Freserving Go., 259 III. App. 39; Ayres v. Graham S. C. . 1. Go., 150 III. App. 137.) In the instant eyes, no bond was re uired

of the complainant and the order appointing the receiver did not expressly dispense with the necessity of giving a bond.

The original order appointing a receiver was entered on July 27, 1928, one of the days of the June term, 1928, of the circuit court of Henry County. At the same term and on the 29th day of September, complainant filed a motion to amend the order and, as cause therefor, represented that on the day the original order was entered, a full hearing was mad, at which the defendants (appellants here) were present and cross examined witnesses; that the court found that a receiver ought to be appointed without bond to the adverse party, but the finding that he should be so appointed without bond, was inadvertently omitted in the order signed by the Chancellor.

The Court thereupon entered an amended order which contains substantially the same findings and decretal orders as did the original order, and in additional thereto, included the following finding:

"The fourt further finds and is of the opinion that the crops, lands and improvements are being neglected, wasted and dissipated, and that it is for that and other good causes and for the interests of all parties to this proceeding, that a receiver be appointed to take charge of the lands, crops, issues and profits of said lands and properly care for the same and conserve the same; and the court is of the opinion for said reasons and other good reasons shown, that a receiver should be appointed without the complainant giving bond to said defendants or any of them."

The decretal portion of the amended order also contains the following:

"It is further ordered that for good cause shown a receiver should be appointed without the complainant giving bond to the adverse party."

The court had an undoubted right to so amend the original order appointing a receiver. It is a general rule that all decrees, no matter how final and conclusive in character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may be then amended, set aside, or vacated by that court. (Hawkins v. Taber, 47 Ill. 459; Court Rose v. Corna, 279 id. 605.)

When a decree fails to set out the court's findings,

of the complainant and the order appointing the receiver win not expressly dispense with the necessity of giving shoul.

Fig original order appointing a receiver was entered on July 27, 1928, one of the days of ine June term and on the Seth circuit court of Henry County. At the same term and on the Seth day of september, complainent filled a motion to arend the order and, as cause therefor, represented that on the day the original order was entered, a full hearing was and, at which the defendants (appellants here) were present and cross examined withesses; that the court found that a receiver ought to be appointed without bout, but the finding that he should be so appointed without bout, was inadvewtently omitsed in one order signed by the Chancellor.

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"The fourt further finds and is of the opinion that the crops, ireds and ingrovements are being rejected, wasted and dissipated, and tret it is for that put of other good causes and for the interests of all parties to this proceeding, that a receiver be appointed to take charge or the tands, crops, issues and profits of said lands and propriy care for the same and conserve the same; and the court is of the epinton for said reasons and owner good rescens snown, that a receiver should be appointed without the complainant giving bond to said detendents or any of them."

The decretel perviou of the amerded order wise con-

tains the following:

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the chancellor in his discretion on motion of either party, may cause it to be amended to include the findings. (Bull v. International Power Co. 84 N.J. Eq. 209)

in that it failed to require a bond or make specific findings obviating the necessity of such requirement, but the amenade amended order cured the error. The record discloses that the receiver entered into bond on July 30, 1928, which date is prior to the date of the entry of the amended order. However, this circumstance is of little consequence, because the amendment relates back to the date of the aring original order. No question is raised as to the receiver's bond, and indeed none can be in this proceeding. His bond is separate and distinct from that required of the complainant. Should the chancellor feel that a new bond should be required of the receiver, he has authority to order it to be given. The question in this case pertains only to the bond required by statute to be given by the complainant, unless the necessity for giving it is obviated by a court finding to that effect.

an original decree because it contained an error which was cured by amendment at the same term the original order was entered.

It would be equally useless to remand the cause for further action in reference to the appointment of a receiver because of a failure to comply with Sec. 54 of the Jhancery Act, when the court by a subsequent order has already complied with it. The record justified the appointment of a receiver without bond, and the original order as amended became effective as of July 27, 1928. It contains sufficient specific findings and decretal orders to sanction the appointment of the receiver and obviate the necessity of the complainant's giving a bond to her adversary.

The order is therefore affirmed.

Order affirmed.

cause it to be sacaded to include the findings. (Spli v. International Power Co. 84 m.J. Eq. 209)

The original order appointing a receiver was erromeous in that it failed to require a bond or make specific findings obviating, the necessity of such requirement, but the guessit casended order cured the error. The record discloses what the receiver entered into bond on July 50, 1928, which acts is prior to the date of the entry of the amended order. However, this eircumstance is of little consequence, because the emandment relates bear to the date of the aring original order. No question is raised as to the reserver's bond, and indeed none can be in this proceeding. His bond is separate and distinct from that required of the complainant. Should the commession feel that a new-cond should be required of the reserver, he has authority to order it to be given. The question in this case pertains only to the wond to be given. The question in this case pertains only to the wond required by statute to be given by the complainant, talesc the recessity for giving it is obviated by a sourt finding to that effect.

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The order is therefore affirmed.

Urder affirmed.

STATE OF ILLINOIS, SS.	
	ON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keep	er of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion o	f the said Appellate Court in the above
entitled cause, of record in my office.	
In Testimony Whereof, I hereunt	o set my hand and affix the seal ot
said Appellate Court, at Ottawa, t	hisday of
	in the year of our Lord one thousand
nine hundred and twenty	
	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 6404

BE IT REMEMBERED, that afterwards, to-wit: On NOV 12 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



Owen Anderson, Administrator of the Estate of Everett Leland Lock, deceased.

appellee,

Appeal from the Circuit Court of La Salle County.

vs.

Lee Myers and Raymond Myers, appellants,

Jones, J.

Plaintiff recovered a judgment against the defendants for \$3000 as damages for the death of his intestate. On May 12th. 1921, William Myers, now deceased, was the owner of a tract of land lying along the east bank of the Vermallion River. Next to the river bank there was a narrow ledge eight of ten feet wide. and from the ledge, a steep cliff arose about fifty feet high. On top of the cliff was a comparatively level area of about 12 acres, on which were numerous stumps and stones. Three sons of William Myers, to-wit, Lee, also called Leo, Alfred, and Bartholomeo, entered into an arrangement with their father whereby said sons were to have the first year's corn crop from the 12 acrex tract in consideration of their services in removing rocks and stumps from the surface. Raymond Myers, a younger brother, assisted them in the work. At the time of the accident and for several days prior thereto, Lee and Raymond were engaged in clearing the land. In doing this work they would push stumps and rocks over the cliff and let them roll down onto the legge or into the river.

On May 12, 1921, Milo Lock, aged 18 years, and his brother, Leonard Lock, aged 11 years, went fishing in the river. They took with them, Everett Leland Lock, plaintiff's intestate, aged five years and eight months. While Everett was sitting on the ledge, a large stone was rolled down the cliff striking and killing him.

The declaration has two counts. The first charges general ngeligence in connection with the rolling of the stone in question over the cliff, and the second charges wanton and wilful negligence on the part of the defendants.

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Appeal from the Circuit Court

of La Salle County.

Owen Anderson, Administrator of the Estate of Eyerett Leland Lock,

deceased,

appellee,

VS.

Lee Myers and Raymond Myers,

appellants,

Jones, J.

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The declaration has two counts. The first cherges general newligence in connection with the rolling of the stone is question over the cliff, and the second charges wanton and wilful negligence on the part of the defendants.

The suit was instituted April 25, 1922, against the father, William Myers and his sons, Raymond and Lee. Raymond was then 18 years of age. No guardian ad litem was appointed to represent him. His father retained Thomas M. Haskins, a lawyer, to defend. Haskins caused his appearance to be noted as counsel for all defendants but filed no plea for any of them.

On March 12, 1923, the cause was continued on motion of the plaintiff and no further action was taken in it for more than four years. In the meantime, June, 1924, Haskins died. William Myers, the father, died June 4, 1925. It is stipulated that Haskin's death was known to the court and to counsel for plaintiff. On May 2, 1927, without any suggestion of Myer's death having been made of record, and without notice to the surviving defendants, a rule on all defendants to plead within five days was entered. Seven months later, on December 5, 1928, plaintiff suggested the death of William Myers, and without notice to the other defendants, a rule to plead instanter was entered against them. Thereupon, they were called and defaulted. A jury was impanelled, testimony on behalf of the plaintiff was heard, and a verdict for \$5,000 was returned in his favor. Neither of the defendants was present nor represented by counsel. At the same term of Court and before judgment was rendered, they entered their motion, supported by affidavits to set aside the verdict and default and for leave to plead. Plaintiff then entered a remittitur of \$2,000. The motion to set aside the verdict and for leave to plead was overruled and judgment was entered for \$3.000.

Defendantsurge that the failure to appoint a guardian ad litem for Raymond Myers was error. When default was taken and judgment entered against him, he had reached his majority. The fact that he was an infant when the suit was instituted and that no guardian ad litem was appointed is immaterial, inasmuch as he became of age before any judgment was rendered against him. (In re Rousos, 119 N.Y.S. 34; Coffey v. Proctor Coal Co. 20 S.W. (Ky.) 286; Bernecker v. Miller 44 Mo. 102; Lancaster v. Barton, 92 W. Va. 615; 24 S.E. 251). After becoming of age, he was entitled to control and manage the litigation,

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and a guardian ad litem need not be appointed, although he was an infant at the commencement of the suit; in fact none should be appointed. (31 C.J. Infants 1133; In re Rousos, supra.)

It is insisted that it was error for the court to enter a rule on defendants to plead and to default them without notice. It is also urged that it was error to assess damages against them without notife. Rule 14 of the trial court is relied upon in support of the contention. That rule provided, "No motion will be heard or order made in any cause, except motions of course, without written notice thereof having been served upon the opposite party before four o'clock p.m. of the day preceding the day mentioned in the notice for calling such motion."

A motion of course is an application for an order which by some standing rule or practice of the court may be granted as a mere matter of routine without hearing both sides. A motion not of course, or a special motion as it is usually termed, is one which is not granted as a matter of course, but which the court in the exercise of its discretion may, on the facts established in support of the application, either grant or refuse. Special motions are those which involve the discretion or judgment of the court and must be heard and considered. They are motions granted after hearing had. (14 Encyc. P. and Pr. 93-9; 42 C.J. Metions and Orders, 466; Stanton v. Kinsey, 151 Ill. 301.) We are of the opinion that motions for a rule to plead are motions of course and are excluded from the rule by its terms. Upon the expiration of the rule, parties not complying therewith are in default. No error is assigned covering the assessment of damages without notice and therefore that question cannot be considered by the court.

The record discloses that the cause was continued from time to time over a period of 5½ years, a large part of which time was during the minority of Raymond Myers. After the death of Mr. Haskins, no attorney appeared for any of the defendants, His death was known to the court and plaintiff's counsel. William Myers, the father, also died. No rule to plead was entered muring the lifetime of Haskins or of William Myers, and no rule was entered or other step taken by plaintiff until about three years

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after the death of Haskins and two years after the death of William Myers.

The education of the sons was meager. Raymond had attended a country school up to the 6th grade and Lee had attended up to the 7th grade. Their affidavits in support of the motion to set aside the verdict and for leave to plead recite that a short time after this suit was instituted, they were told by their father that it had been dismissed and would never be brought to trial. It is evident that they did not know the suit was pending against them.

Under the circumstances, the defendants were entitled to make their defense and it was error to refuse to set aside the verdict and default. The judgment is reversed and the cause remanded with directions to set aside the verdict and default and to permit appellants to plead to the declaration.

We express no opinion at this time as to the sufficiency of the evidence in support of plaintiff's case.

Reversed and remanded with directions.

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We express no opinion at this time as to the sufficiency of the evidence in support of plaintiff's case.

Reversed and remanded with directions.

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STATE OF ILLINOIS,	\$88.
SECOND DISTRICT	I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof.	
do hereby certify that the for	regoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty
	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

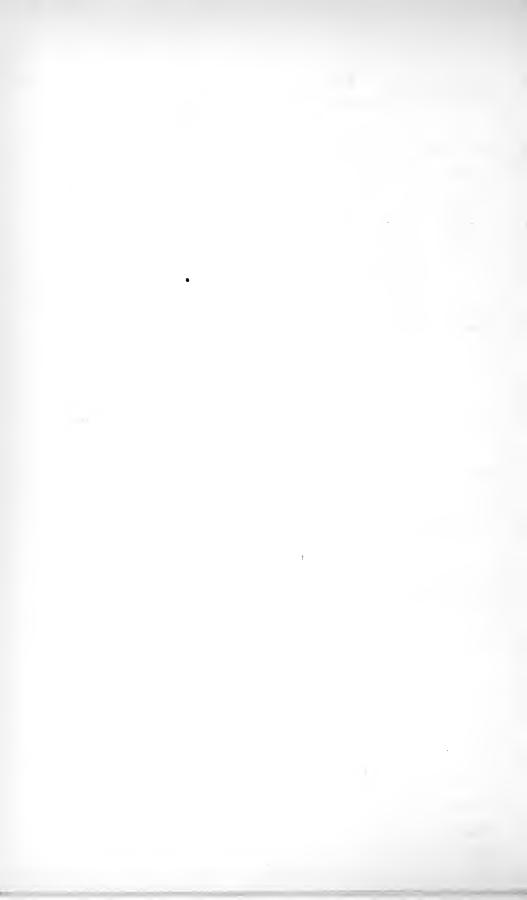
Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 641

BE IT REMEMBERED, that afterwards, to-wit: On JAN 3 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



In The

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D., 1929.

F. H. Borm,

Appellee.

VS.

Aurora, Elgin and Fox River Electric Company, a Couperation,

Appellant.

Appeal from Circuit Court of Kane County.

OPINION by BOGGS. P. J.

An action on the case was instituted by appellee against appellant in the Circuit Court of Kane County to recover damages alleged to have been caused through negligence on the part of appellant.

The declaration originally consisted of five counts, but the cause was tried on the first count and plea of not guilty. A verdict was rendered in favor of appellee assessing his damages at \$207.35 and judgment was rendered thereon. To reverse said judgment this appeal is prosecuted.

The accident in question occurred in the city of Elgin on April 19, 1928. Douglas avenue in said city runs in a northerly and southerly direction, and is a paved street forty-two feet wide from curb to curb. In the center of said street is the track of appellant company. Kimball street runs in an easterly and westerly direction, crossing Douglas avenue at right angles. North street, an east and west street, crosses Douglas avenue one block south of Kimball. On the east side of Douglas avenue is located the L. E. Cropp Garage. The

Appeal from Circuit Court of Kane Courty.

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APPRILATE COURT ON INLINIES

Secure District

October Term, A. D., 1929.

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Aurora, Elgin and Fox River Electric Company, a Compunation,

Appellent.

OPINION by BORGS, P. J.

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The declaration originally consisted of five counts, but the cause was tried on the first count and ples of not guilty. A verdict was randered in favor of appoiltee assessing his damages at \$207.35 and judgment was rendered thereon. To reverse said judgment this appeal is prosecuted.

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center line of the driveway of Cropp's Garage is about 110 feet south of the south curb of Kimball street.

At a point in Douglas avenue, 180 feet south of Cropp's Garage is located a switching track running south from said point. Just opposite said garage the collision in question occurred.

It is first contended for a reversal of said judgment that the evidence fails to show due care on the part of appellee, and that that was, a matter for affirmative proof on his part. Appellee testified:

"At about 11:00 o'clock or 11:30 on April 19, 1928, the weather was clear and I was driving my four passenger Buick coupe west on North street and had turned off North street on Douglas avenue, going to the Cropp Garage.

"I drove up Douglas avenue partly--pretty close to the center of the street, east of the track there. On the way up and as I was going to turn thereo I noticed there was an automobile following me, and I proceeded and slowed up to a stop to make the turn into the Cropp Garage. The front end of my car was south of the entrance about four or five feet. I was very close to the east rail of the street-car track, about a foot from the track. I paused for a moment to see what the car behind me was doing, but previous to that I looked ahead and I saw a street car that appeared -- it was at the far end of the next block, I would say about 400 or 450 feet north in Douglas avenue. I first saw that oar as I was about to stop in front of the Cropp Garage. The automobile behind passed to my left. I proceeded to shift the gears and turn into the garage door. At that moment the car struck me. " Appellee further testified that after said collision appellant's car was at the switch track about 200 feet from his automobile. On cross examination appellee testified that when he lirst saw appellant's car it was about three hundred or three hundred and fifty feet north of the south line of Kimball street; that there was an electric light at Kimball street and that at that point appellant's car was being operated

canter line of the driveway of Cropp's Garage in about 110 feet south of the south ourb of Mimball Street.

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"The accident happened just right at the south corner, at the driveway; right this side of Cropp's Garage.

"I was up about at Kimball and he was down about at North. We was going to meet one snother and I was on the east side of the track, that is the right side and he was coming on down. \* \* \* \* He continued in the same path up till about ten feet of me and all of a sudden he turned right over to the track. \*\*\*\*\*\* When he first made the turn he was, I should judge, about three or four feet from that track, when he first made the turn to the track, and then the collision occurred. \* \* \* \* I had made an application of air at the time when I saw him turn out to the track and had slowed my car down for the switch. \* \* When I saw that the collision was going to happen, I jumped up and let loose of the controls and stepped back out of the way because of the glass in front of me. By stepping back the emergency brake was automatically applied and it stopp a the The last I saw of the automobile before the collision it was about ten feet away. It was moving at about the same rate

at about forty miles per hour. He was then asked, "Did you look at it again?" He answered, "I did not have much time to look at it. \* \* \* I was just getting under headway to get over to the garage." The record dir choses that the left side of appellee!s car, front and bask were injured by the collision. Appelled is corroborated as to the location of end he end vo neighbor of the collision ov neighbor as ald men working in seld garage. Two police officers testified that After said collision appellee's orr was standing parallel to appellant's track about sir inches east of the east rail. He is also corroborated by several vitaesses as to the location of appollant's ear after sell collision, navely that it was about 180 feet south of the said garage. Appellee and A. R. Edwards, appellant's motorman were the only eye witnesses to Mdwards testified: the collision.

"I was up about at Mabail and he was down about Me was going to meet one snother and I was on the

 of speed that I was, about twelve or fifteen miles an hour. The accident occurred at the south line of the driveway and my car came to a stop about forty or fifty feet north of the switch point."

This witness further testified that operating appellant's car when the street was dry at a rate of 15 miles per hour it could be stopped in about 60 or 70 feet. Appellant's General Manager testified that it would probably take about 150 to 105 feet to stop the car when it was running 15 miles per hour.

The foregoing in substance is the testimony with reference to how the collision occurred.

In Lang v. Chicago Railways Co., 181 Ill. App. 654-656. The driver of a team of horses turned across the tracks of the street car company in the path of an oncoming car. At the time the driver so attempted to cross, the car was some considerable distance up the track. The rear end of the driver's wagon was struck and the driver was injured. The court held that it was a question of fact for the jury as to whether the driver of said tems was guilty of contributory negligence.

We are of the opinion and hold that on the record in this case we would not be justified in holding as a matter of law that appellee was guilty of contributory negligence. Chicago & J. E. Ry. Co. v. Wanie, 230 Ill. 536-555. Chicago & N. W. Ry. Co. v. Mansen, 166 Ill. 623-629.

It is next insisted that the court erred in permitting two of the policemen of said city to testify as to what appellant's motorman said at the street car barns a few minutes after said collision.

We are of the opinion that the court erred in admitting said testimony. However, the testimony of said notorman on behalf of appellant was in substance very much to the same effect as the testimony objected to. We would not therefore be justified in reversing said judgment on account of the ruling of the

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This witness further testified that operating appellant's our the street was dry at a rate of 15 miles perhour it could be stopped in about of or 70 feet. Appellant's General Manager testified that it would probably take about 160 to 155 feet to stop the our when at was running 15 miles per hour.

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court on admission of said testimony. Weinberger v. McDonough, 98 Ill. App. 441-443. Gruver v. City of Dixon, 85 Ill. App. 79-81. It is also insisted that the court erred in giving the following instruction on behalf of appellee: "You are further instructed that, while is a matter of law the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the issues in his favor."

The giving of this instruction has been approved by the Supreme Court in Hanchett v. Haas, 219 III. 346-548.

Taylor v. Felsing 164 III. 331-336. Chicago City Ry. Co.

v. Bundy, 210 III. 59-48. In the more recent cases the Supreme Court has criticized the giving of instructions of this character but has never so far as we have found held that in and of itself the giving of this instruction constituted reversibly error. While we do not approve of the giving of this instruction we would not be warranted in reversing the judgment on account thereof. Watts v. Wabash Railway Co., 219 III. App. 549-556.

It is also insisted that the court erred in refusing appellant's instruction No. 20. In so far as this instruction states correct principles of law it was covered by other given instructions. The court did not err in refusing said instruction. Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

court on admission of said testimony. Tetrberger v. McDonouch, 90 Ill. App. 441-445. Truver v. City of pixon, 85 Ill. App. 49-51. It is also included that his court erred in giving the following instruction on behalf of appellee: "You are larther instructed that, while as a matter of law the burden of proof is upon the plaintiff, and at is for his to prove may ease by a preponderate of the evidence, stall if the jury rind dust the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the issues in his ravor.

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STATE OF ILLINOIS,	я.
SECOND DISTRICT	I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
and for said Second District of	the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the fore	going is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my	office.
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty
	Clerk of the Appellate Court
(53761—3M—7-27)	



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 641<sup>2</sup>

BE IT REMEMBERED, that afterwards, to-wit: On JAN 3 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



EMMETT HASTINGS,
Appellee

VS.

ABLE TRANSFER COMPANY, a corporation, Appellant.

Appeal from Circuit Court,
Lake County.

Boggs, P. J.,

Appellee was driving south on State Route 21. A short distance north of the town of Lake Villa his automobile collided with the rear end of a truck belonging to appellant, driven by one Edward Smaller. Appellee was injured and his automobile was damaged as a result of said collision. To recover therefor, this action was instituted in the circuit court of Lake County.

The declaration originally consisted of four counts. The second and fourth counts were withdrawn or abandoned by appellee, and the cause went to trial on the first and third counts, to which appellant filed a plea of not guilty and a plea denying the ownership or control of said truck. Dring the trial, the plea denying ownership was withdrawn. The first count of the declaration is based on a charge of general negligence. The third count is based on an alleged violation of the following Statute:

"When upon any public highway in this state during the period from one hour after sunset to sunrise, every motor bicycle shall carry one lighted lamp and every motor vehicle two lighted lamps showing white lights or lights of a yellow or amber tint visible at least 200 feet in the direction towards mixth which such motor bicycle or motor vehicle is proceeding and each motor vehicle or trailer shall also exhibit at least one lighted lamp which shall be so situated as to throw a red light visible in the reverse direction."

Ay c.l.from Circ.it Court, Lake Cousty. MEDETT HASTINGS,

Appellse

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ABLI THIMSTER COMPARY, a corporation, .vecllant.

Boggs, P. J.,

As person 21, 1928, between 11:00 nu 11:60 P. M., Appellee was driving south on State Konto Pl. A short and the team of take Villa has automobile collided with the rear end of a truck belonging to appellent, arigon by one idward Smaller. Appellee was informed and his outemplied was damaged as a result of said collision. To recover Acrefor, this action was instituted in the circuit court of E to Unant.

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A trial was had, resulting in a verdict and judgment in favor of appellant for \$800. To reverse said judgment, this appeal is prosecuted.

One of the grounds urged for a reversal of said judgment is that the court erred in derying the motion made by appellant at the close of appellee's evidence and again at the close of all the evidence, to direct a verdict in favor fx of appellant. It is only necessary to say that, taking the evidence in its most favorable aspect in connection with appellee's case, it fairly tends to prove the averments of his declaration. This being true, the court did not err in refusing to direct a verdict.

It is also contended that the verdict is against the manifest weight of the evidence. In this connection, it is strenuously insisted that appellee was guilty of contributory negligence, in failing to have his bright lights on just prior to and at the time of said collision.

Appellee testified that he did not have on his bright lights, but had an his dinmer headlights. He also testified that at the time of the collision he was driving twenty-five miles per hour; that he did not see appellant's truck until he was unable to avoid the collision. He further testified that appellant's truck had no light of any kind on the rear, and that "at the moment when I was two or three feet in back of this truck or just a moment prior thereto, there were machines going in the opposite direction, with lights."

On cross examination, appelled testified: "I could not see how far away the lights of the closest car were immediately prior to the time I ran into the truck. There were cars going along, one after the other." He also testified that "at that time (referring to the time of the collision), the truck, I think, was pretty well toward the center of the road."

Three witnesses on behalf of appellee testified that they had been serving as police officers or deputy sheriffs at a boxing match that had been held at Antioch, a few miles north of where

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the collision occurred; that they left Antioch about two minutes after appellee, and that they arrived at the place of the collision very shortly after it occurred; that they saw the lantern in question and it was not lit; that they felt of the globe and that it was cold. Certain of said officers also testified that the globe was smoked. Appellant's driver admitted that it was smoked to some extent.

Shaller, the driver of appellant's truck testified that the rear light on said truck was not working; that his foreman or boss had borrowed a lantern and had tied the same to a stake at the rear of the truck, near the left side; that the lantern was burning just prior to the collision; that he had a mirror near the driver's seat, which disclosed that fact.

Appellee's testimony that said truck was not on the right of the center of said pavement, is corroborated by the two of the police officers above mentioned. Quendt testified: "With reference to the center of the road, the left rear wheel was a trifle over the black line." Klarkowski testified: "The truck was standing over the black line. I could not say how far over. It was over on the left hand side as he was going south, on the wrong side of the road."

Appellee was further corroborated in his testimony that there was no light on the rear of said truck, by one Marvin Johnson. This witness' testified that on the evening in question he had been at Antioch and left there between 11:00 and 11:30, going south on Route 21. He was asked: "Did you that evening, while headed south on Route 21, have occasion to see a large truck driven south on Route 21?" This question was objected to, the objection was overruled and he answered, "Yes." He was then asked: "Was there any other truck on that road within a period, say from the time you left the Antioch Palace until after you left this truck, if you did leave it, that evening?" This question was objected to, the objection was overruled, and he answered, "No." He further testified: "I first saw the truck on Route 21 just as I crossed the St. Paul tracks. It was about 200 feet south of the track. I had already

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passed the track. The first time I saw this truck, It was about 20 or 25 feet away from my machine. We were going about 35 or 40 miles an hour at the time. I did not observe any lights on the rear of this truck. I did not observe any red light. I did not observe any white light. As I suddenly found this truck in front of me I was going on a 45-drgree angle that turns there. Then you get across the track, you shoot straight south again. When I swung back to the right side of the road, my lights hit the truck.

Appellee testified that, at the time of the collision, appellant's truck was not moving. Shaller testified that as he was proceeding south he had had trouble with his engine; that he was running about five miles per hour, as he expressed it, " was babying it along"; that at times the engine would get hot and that he would have to stop until it would cook off.

The foregoing in substance is the testimony with reference to how the collision occurred. Counsel for appellant, in support of his contention, that appellee was guilty of contributory negligence as a matter of law, cites Johnson v. Gustafson, 233 App. 216, and Sugru v. Highland Park Yellow & abk Cab Co., 251 App. 99% In Johnson v. Gustafson, supra, the appellate court of the first district, and in the latter case, this court held in effect that the provision of said statute with reference to headlights was/the purpose of assisting the driver to observe what is ahead of him, as well as a warning or notice to cars or persons coming from the opposite direction.

While recognizing the principle laid down in these cases, we must also keep in mind the provision of the statute which requires the driver of an automobile, in meeting other cars to dim or extinguish his bright lights when within 250 feet of the oncoming vehicle.

The questions of negligence, contributory negligence and the proximate cause of an injury are questions of fact which should be left to the jury to determine. Milauskis v. Terminal R. R. Assn, 286 Ill/ 547-557; Elgin, J. & E. R. Co. v. Thomas, 215 Ill. 158-161; Wabash R. Co. v. Brown, 152 Ill. 484-488; Bux f. Illinois C. R.

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Co., 229 App. 50-54.

In this case, it was a question of fact for the jury as to whether appellee, in not having his bright lights turned on, was guilty of negligence contributing to said collision. The jury were fully warranted in finding as they did, that appellee was not so negligent.

It is next insisted that the court erred in its ruling on the two questions above set forth, propounded to the witness Johnson. No objection was made that these questions were leading or suggestive. The objection was general. Said testimony was competent as tending to show that the truck this witness saw was appellant's truck, and that the same, at the time he saw it, did not have a tail light of any character. However that may be, this witness testified at considerable length on direct examination, without objection, with reference to this truck. On cross examination, counsel for appellant went into the transaction quite fully, developing in more detail all of the facts and circumstances testified to by this witness. We therefore hold that appellant is not in a position to seriously question the ruling of the court in this connection.

It is next insisted that the evidence fails to show negligence on the part of the driver of appellant's truck. It is insisted that, while the tail light on said truck was not burning, the lantern in question, which the driver of said truck testified was lighted, was a sufficient compliance with said statute.

It is only necessary to say that the preponderance of the evidence is to the effect that no light of any character was displayed at the rear of said truck.

It is next insisted that the court erred in its rulings on the instructions. Five instructions were given on the part of appellee and twelve on the part of appellant. It is insisted that the second, third and fourth instructions on behalf of appellee were erroneous.

As to appellee's second instruction, it is contended that the court erroneously stated to the jury that failure to have a

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It is next insisted that the court erred in its rulings on the instructions. Five instructions were given on the part of appellee and twelve on the part of appellant. It is insisted that the second, third and fourth instructions on behalf of appellee were erroneous.

As to appellee's second instruction, it is contended that the court erroneously stated to the jury that failure to have a

red light exhibited from the rear of said truck was negligent. What said instruction in effect told the jury was, that if such light was not exhibited and if the failure to so exhibit said light proximately caused the damage in question, then appellant was negligent.

It is also insisted as to this instruction that it does not correctly set forth the care to be exercised by appellee. Said instruction refers to the care required of appellee as "reasonable under the circumstances." The instruction does not correctly define the care required of appellee, as it should have been "due care", or "ordinary care". However, appellant's second given instruction contains the same language. Appellant is, therefore, not in a position to urge this objection.

Said instruction is also continued because it sets forth certain provisions of section 17, chapter 95 a of Cahill's Statutes, with reference to the character of lights, etc., which automobiles should be equipped with, the contention being that said instruction lays undue emphasis on the character of rear light an automobile should be provided with. Appellant's fifth given instruction contains the same quotation from said statute. It is therefore not in a position to urge this objection.

Appellee's third and fourth given instructions are as follows:

"The Court instructs the jury that if you believe from the evidence that the plaintiff has proven his case by a preponderance or a greater weight of the evidence, then the plaintiff is entitled to recover, and you should find the defendant guilty."

"The Court instructs the jury that if you believe from the evidence that the defendant negligently failed to provide a red lighted rear lamp on his truck and that such negligent failure so to provide resulted in damage to the plaintiff while the plaintiff was in the exercise of due care for his own safety, then you should find the defendant guilty."

It is insisted against instruction no. 3 that it fails to limit the right of recovery to the charges of negligence set

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Appellee's third and fourth given instructions are as follows:

"The Court instructs the jury that if you believe from the evidence that the plaintiff has proven his case by a preponderance or a greater weight of the syldence, then the plaintiff is entitled to recover, and you should find the defend at guilty."

"The Court instructs the jury that if you believe from the evidence that the defendant negligently relied to provide a red lighted rear land on his smark and that a chargingent failure so to provide resulted in a .m., e to the plaintiff was in the exercise of the care for his own cafety, onen .cu should find the defend at guilty."

It is insisted against instruction no. U that it : ils to limit the right of recovery to the charges of realise see set

forth in the declaration. There was no conflict in the evidence with reference to the negligence charged. This objection is not well taken.

The same objection is made to the fourth instruction, and also that it over-emphasizes the importance of the absent red light. There is no merit in this contention. The court did not err in giving said instruction.

It is also insisted that the court erred in refusing appellant's sixth refused instruction. An examination of this instruction discloses that it is the same as appellant's first given instruction, word for word, except that the refused instruction includes the language "as charged in plaintiff's declaration." Apellant having seen fit to offer two instructions of practically the same character, it is not in a position to complain that the court may have given the instruction which appellant deems less favorable to it. Thompson v. Duff, 119 Ill. 226-227; Korn v. Chicago Ry. Co., 271 Ill. 329-335; Sullivan v. Ohlhaver Co., 291 Ill. 359-363.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

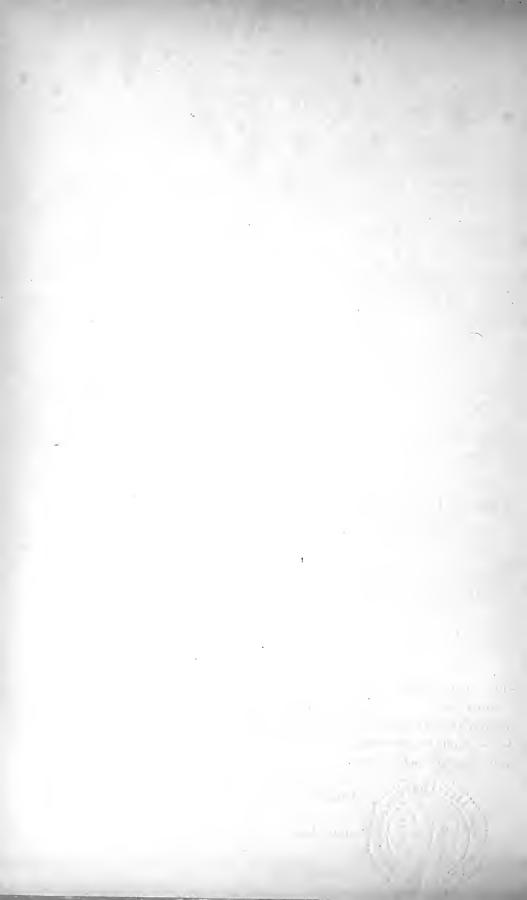
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STATE OF ILLINOIS,	\.\.\.\.\.\.\.\.\.\.\.\.\.\.\.\.\.\.\.
SECOND DISTRICT	I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second Distric	t of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the f	oregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in	my office.
	In Testimony Whereof, I hereunto set my hand and affix the seal ot
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty
	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 641<sup>3</sup>

BE IT REMEMBERED, that afterwards, to-wit: On JAN 3 1000 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



General No. 8148

Agenda No. 40

In the Appellate Court of Illinois

Second District

October Term, A.D. 1929.

Nic Wetzel,.

appellee,

VS.

Fred K. Nimpfer,

appellant,

Appeal from the Circuit Court of Lake County.

Opinion by Boggs, P. J.

An action in assumpsit was instituted by appellee against in the circuit court of Lake County. The declaration consisted of the common counts, accompanied by an affidavit of claim. To said declaration a plea of the general issue was filed by appellant. A trial was had, resulting in a verdict and judgment in favor of appellee for \$3,249.00. To reverse said judgment, this appeal is prosecuted.

On October 5, 1929, a xm motion was made by appellee in this court to strike the bil/of exceptions from the files, on the ground that the same had not been filed within the time fixed by the court. The record discloses that said judgment was entered on April 6, 1929, being one of the regular days of the March term of said court. An appeal was prayed by appellant. The court entered an order allowing said appeal, upon filing bond within thirty days and a bill of exceptions within ninety days. The time for filing the bill of exceptions, by its terms, expired on July 6, 1929. While it is conceded that the bill of exceptions was not filed within the time originally fixed, appellant insists that, on September 10, 1929, at a special May term, an order was entered extending the time for the filing of said bill of exceptions to that date; that, pursuant to said order, said bill of exceptions was filed.

A trial court has jurisdiction to extend the time for

In the Appellate Court of Illinois Second District

October Term, A.B. 1929.

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Fred K. Nimpfer,

appellant,

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## Opinion by Boggs, E. J.

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ment was entered or at a subsequent term. Rioter v. C. & E. R.R.

Co., 273 Ill. 625-627; Foley v. Boyer, 153 App, 613-615. However,
the order extending such time, if made at a succeeding term, must
be entered prior to the expiration of the time originally fixed.

Shalts v. Shults, 229 Ill. 420-429; Richter v. C. & E. R. R. Co.,
supra; Foley v. Boyer, supra. In this case, the time was not extended during the March term. It does not purport to have been
extended at the May term until after the time originally fixed for
the filling of said bill of exceptions had expired. Said bill of
exceptions was therefore not filed within proper time, and the
motion to strike the same was allowed and said bill of exceptions
was stricken. Zbinden v. DeMoulin, 243 App. 509-512; Zbinden v.
DeMoulin, 328 Ill. 156-159; People v. Rosenwald, 266 Ill. 548-556;
Illinois Improvement & Ballast Co. v. Heinsen, 271 Ill. 24 23-25.

The errors assigned on the record are all directed to matters which must be shown by a bill of exceptions; in other words, the errors assigned do not go to the common law record. That being true, the judgment of the trial court must be affirmed. Zbinden v. DeMoulin, supra, 513; People v. Lucor, 317 Ill. 423; People v. Rosenwald, supra, 556.

filing a bill of exceptions, either at the term at which the Jungment was entered or at a subsequent term. Aidder v. C. a S. R.R. Jo., 273 111. 625-627; roley v. Boyer, 155 App, 618-715. However, the order extending much time, it made at a succeeding term, must be entered prior to the expiration of the time originally fixed. Aults v. Shults, 229 111. 420-429: Richter v. C. & E. R. R. Co., supra; Foley v. Boyer, supra. In this onse, the time was not axtended diving the march term. It does not purport to have been extended at the may term until after the time originally fixed for the filing of said bill of exceptions had expired. Said bill of exceptions axes therefore not filed within proper time, and the motion to strike the same was allowed and said bill of exceptions was stricken. Zbinden v. Desculin, 248 App. 509-512; Zbinden v. Desculin, 328 Ill. 156-159; People v. Nosenwald, 266 Ill. 348-25.

The errors assigned on the record are all directed to mattere willoh must be shown by a bill of exceptions; in other words, the errors assigned do not so to the common law record. The being true, the judgment of the trial court must be affirmed. Abinden v. Demoulin, sugra, 51%; People v. Lusor, 317 111. 48%; People v. Ausor, 317 111. 48%; People v. Ausor, 317 111. 48%; People v.

STATE OF ILLINOIS,	]
SECOND DISTRICT	I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
and for said Second District	of the State of Illinois, and the keeper of the Records and Scal thereof,
	regoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in r	ny office.
	In Testimony Whereof, I hereunto set my hand and affix the seal ot
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty
	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 641\*

BE IT REMEMBERED, that afterwards, to-wit: On JAN 5 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



Agenda No. 43

General Number 8152

ADOLPH KOCH,

Appellee

-VS-

ILLINOIS FOWER AND LIGHT COMPANY (A Croporation) Appellant Appeal from Circuit Court
of Knox County

Boggs, P/ J.

An action on the case was instituted in the circuit court of Knox County by appellee against appellant and one R. H. Stoner to recover for injuries to appellee and his automobile, alleged to have been caused by the negligent operation of appellant's automobile, by the defendant Stoner.

The declaration consists of three counts, each of which in effect charges that R. H. Stoner, the driver of appellant's car, as he approached said intersection, was driving said car in a southerly direction on the wrong side of said street and at a high and dangerous rate of speed, and that he negligently failed to slacken said speed so as to permit appellee, to cross said intersection in safety. Each of said counts aver due care on the part of appellee just prior to and at the time of said collision for his own safety and the safety of his automobile. To said declaration as finally amended appellant and said Stoner filed pleas of not guilty. During said trial, said cause was dismissed as to Stoner. A werdict was returned, finding appellant guilty and assessing appellee's damages at \$500. A motion for a new trial was made whereupon appellee entered a remittitur of \$48, reducing the amount of said verdict to \$452. The motion for a new trial was overruled, and judgment was rendered on said verdict against appellant for said amount. To reverse said judgment, this appeal is prosecuted.

The principal grounds relied on for a reversal are: First, that the verdict is against the manifest weight of the evidence; second, that the court erred in giving appellee's Agenda No. 45

Appeal from Circuit Court

of knox County

General Mumber 8152

ADOLPH KOCH,

Appellee

ILLINOIS COWER AND LIGHT

COMPANY (A Croporation)
Appellant

Boggs, P/ J.

An action on the case was instituted in the circuit court of Knox Cpunty by appellee against appellant and one R. H. Stoner to recover for injuries to appellee and his automobile, alleged to have been caused by the negligent operation of appellant's automobile, by the defendant Stoner.

The declaration consists of three counts, each of which in effect charges that H. H. Stoner, the driver of appellant: a oar, as he approached said intersection, was driving said car in a southerly direction on the wrong side of said street and at a high and dangerous rate of speed, and that he negligantly failed to slacken said speed so as to permit appellee, to cross said intersection in safety. Each of said counts aver due care on the part of appelled just prior to and at the time of said collision To said for his own safety and the sarety of his automobile. declaration as finally amended appellant and said Stoner filed pleas of not guilty. Puring sold trial, said couse was dismissed as to Stoner. A verdict was returned, finding appellant guilty and assessing appellee's damages at \$200. A motion for a new urlar was made whereupon appellee entered a remittitur of 446, reducing the amount of said verdict to \$452. The motion for a new trial was overruled, and judgment was rendered on said verdiet against To reverse said judgment, this appeal appellant for said amount. is prosecuted.

The principal grounds relied on for a reversal are:
First, that the verdict is against the manifest weight of the
evidence; second, that the court erred in giving appallacia

second instruction.

South Frairie and east South streets in the City of Galesburg intersect at right angles, Prairie street running north and south, and South street running east and west. Both of said streets are paved for some distance on either side of the intersection, and there is a street car track about the center of Prairie street.

About 1:15 in the afternoon of March 1, 1926, appellee was driving west on South street toward its intersection with Prairie street, while R. H. Stoner, an employee of appellant, was driving south on Prairie street toward said intersection. In the automobile with appellee was a Mrs. Steuard. No one was riding with Stoner.

Appellee testified: "I was driving fifteen miles an hour from Kellogg street (first street running north and south east of Prairie Street) to about the point of twenty feet of the intersection, I started to slow down and come down to about five to eight miles per hour from a point twenty feet east of the intersection into the intersection . \* \* \* when he (Stoner) got within ten feet of the intersection I saw that he was going fast, about thirty miles per hour he was about 175 feet from the intersection. \* \* I didn't see the Stoner car at all when I was twenty feet east of that intersection. \* \* \* When I was twelve feet east of that intersection and saw Stoner the first time, he was probably 200 feet north of the intersection, that is my best judgment."

Mrs. Steuard testified: "Mr. Koch was driving about fifteen miles an hour as he left Kellogg street going toward Prairie. Kuch slowed down for the intersection as he approached Prairie street. Was about twenty feet from the intersection when he began to slow down. When he began to slow down I could see up Prairie street just a short ways. \* \* \* Mr. Koch was not going very fast when he entered the intersection, about five to eight miles an hour. I saw Stoner's car when he came to within twelve

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F31, 5 7 12 - 10% \*

feet of the intersection. His car was probably half a block distant, north of Prairie street and headed south. As Koch drove across the intersection Mr. Stoner's car kept on coming probably thirty miles an hour at least. He did not slow down when Koch was crossing the street car tracks. \* \* \* Koch attempted to go the same direction that the Stoner car was driving. He was not allowed to do that. Stoner struck us just then right even with the seat that I was sitting in, on the right side."

E. Duden, signalman for the Burlington Railroad, testified that as he was proceeding south on Prairie street, approaching said intersection, he heard the crash and saw the cars in movement, after he heard the crash. Among other things he testified: "I did not observe Koch's car. It was hit on the north side, about the center. \* \* \* The Stoner car took a glance after it hit, swung around, made a deep swing of about thirty feet over the terrace, over the sidewalk into the yard about ten feet, and back out on the street again on South Street where I seen it standing. When it hit the other car it glanced off and made a deep swing around, then over the curbing, over the terrace, over the sidewalk, and I presume eight, nine, ten feet, whatever it was. \* \* The Stoner car was about thirty feet west of the intersection when it stopped."

On the part of appellant, R. H. Stoner, the driver of appellant's car, testified that as he drove down Prairie street, approaching South street, he was driving fifteen to eighteen miles an hour; that as he approached said intersection he looked both east and west; that as he looked east he saw appellee's car approaching. \* \* \* "I was about twenty-five or thirty feet away from the north line of the intersection and the Velie coupe was thirty-five or forty feet from the east line of the intersection. At this time when the Velie coupe was thirty or forty feet east of this intersection it was being driven at twenty-five miles an hour. The speed of the Velie coupe did not at any time slacken, to my knowledge, until the collision took place. The collision took place just west of the street car rails, just west of the center of the street, and with reference to the center of South street it was about the center of

feet of the intersection. His car was probably mif a block through north of Prairie Street and headed couth. As Koch drove across the intersection in Stoner's car kept on coming probably thirty miles an hour at least. He did not slow down when Koch was crossing the street car tracks. \* \* \* Koch attempted to 30 the same direction that the Stoner car was driving. He was not allowed to ac that. Stoner struck is just then right even with the seat that I was sitting in, on the right side.

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the street. \* \* \* I seen him coming and threw my car to the right, and we struck in that position. Sort of V-shape. I turned my car to the right when I saw the crash was inevitable, and tried so to get out of his way."

On cross examination, this witness testified: "When I saw this Velie I was thirty feet north of the intersection. I didn't slow down any, but just took the ordinary course. The first thing I did when I saw this ear, I undertook to turn to the right.

\* \* \* I could see the car (Velie) thirty or forty feet east of the corner. I judge he was going twenty-five miles an hour. \* \* \* I claim he hit me on the right front fender and wheel. At the time the cars actually came together, my car was about two or two and a half feet west of the west rail. I didn't know anything about the cars came together. I lost control of the car."

Nels Dimmitt testified on behalf of appellant that he worked for the Terry Lumber Company, that his office was stit situated at the southeast corner of the intersection of South and Prairie streets; that "immediately prior to the time of this collision I was at the north window looking out on to the streets there. I saw an automobile approaching the intersection from the north coming down Prairie Street. It was the one driven by Mr. Stoner. I saw an automobile approaching the intersection from the east on South street. It was the one driven by Mr. Koch. The speed of the Stoner automobile as it came south to said intersection was from twenty to twenty-five miles an hour. And the speed of the Koch automobile as it went west toward that intersection was going twenty to twenty-five miles per hour. They were both approaching the intersection at about the same rate of speed. When I saw the Stoner automobile operating at twenty to twenty-five miles an hour it was fifty to seventy-five feet north of the north line of the intersection, and when I saw the Koch car operating at twenty to twenty-five miles an hour I would say it was fifty to seventy- . five feet east of the east line of the intersection. Both automobiles were about the same distance from the intersection."

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This witness further testified that he did not see either of the automobiles after they entered the intersection; that he heard the crash but did not go out to where the collision took place.

This in substance is the testimony on behalf of both of said parties.

The testimony being sharply conflicting, it was a question of fact for the jury as to whether appellee was in the exercise of due care and as to whether the driver of appellant's car was guilty of negligence as charged. The verdict of the jury is not against the manifest weight of the evidence. We would, therefore, not be warranted in reversing the judgment on account of the evidence. Bradley v. Palmer, 103 Ill. 15-88; VanMeter v. Lambert, 104 App. 2430249.

The instruction complained of is as follows:

"In determining the weight to be given the testimony of a witness, you will take into consideration the intelligence of the witness, the circumstances surrounding the witness at the time concerning which he or she testifies, his or her interest, if any, in the event of the suit, his or her bias or prejudice, if any, his or her manner on the witness stand, his or her apparent fairness or want of fairness, the reasonableness of his or her testimony, his or her means of observation and knowledge, the character of his or her testimony, whether negative or affirmative, on any fact, and all matters and facts and circumstances whown by the evidence upon the question of the weight to be given his or her testimony, and given to each witness' testimony such weight as to you may seem fairly entitled to."

It is urged against this instruction that the court erred in stating to the jury "you will take into consideration," etc., instead of saying, "you may take into consideration," etc. While we are of the opinion that it would have been more appropriate to have used the word "may" yet the use of the word "will" does not constitute reversible error. Meyer v. Mead, 83 Ill. 19-20; C. B. & Q. R. R. Co. v. Pollock, 195 Ill. 156-162; Chicago Union

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Traction Co. v. Yarus, 221 Ill. 641-643; Deering v. Barzak, 227 Ill. 71-78; Elgin, J. & E. Ry. Co. v. Lawlor, 229 Ill. 621-630; Illinois Steel Co. v. Ryska, 102 App. 347-355.

It is also insisted that this instruction directed the jury to take into consideration "the circumstances surrounding the witnesses at the time concerning which he or she testified," etc., without limiting such circumstances to those disclosed by the evidence. While the instruction is not as carefully guarded in this connection as it should be, taking the instruction as a whole, it is not seriously objectionable. Deering v. Barsak, supra, 78.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Traction Co. v. Marus, 2Pl ill. 641-643; Berring v. Barrek, 2D7 Ill. 71-78; Main, J. & E. Ry. Co. v. Lawler, 223 Ill. 621-680; Illinois Steel Co. v. Myska, 102 App. 547-255.

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STATE OF ILLINOIS, SECOND DISTRICT	ss. I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
and for said Second Distr	ct of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the	foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in	
,	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty
	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hyndred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 6415

BE IT REMEMBERED, that afterwards, to-wit: On JAN 3 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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8040 Agenda 45.

Mary H. Clarey,

Defendant in error,

vs.

Wilbur J. Hudler,

Plaintiff in Error.

Error to the Circuit Court of Winnebago County.

Jett, J.

Mary H. Clarey, defendant in error, hereinafter referred to as plaintiff, instituted suit in the circuit court of Winnebago County, against Wilbur J. Hudler, plaintiff in error, hereinafter referred to as defendant, for food, drink, washing, lodging, chattels and other necessaries, such as clothing, furnished to Frances Hudler, the then lawful wife of the defendant Wilbur J. Hudler,

A jury trial was had with a finding in favor of the plaintiff for \$594.00; judgment was rendered on the verdict and the defendant sued out this writ of error.

It appears from the evidence that Wilbur J. Hudler, the defendant, and Frances Rummelhagen were married in November, 1922, at St. Joseph, in the State of Michigan. At the time of their marriage the defendant was of the age of 17 years, and Frances Rummelhagen was of the age of 16 years. After their marriage they resided for a short time in Detroit, and then went to Rockford, Illinois, the home of the plaintiff. Upon their going to Rockford, these young people laved with the plaintiff for about five months, and then went to California and resided with the mother and sister of the defendant.

On or about the 12th day of May, 1924, the plaintiff wrote to her daughter Mrs. Hudler, requesting that she and her husband return to Rockford, and in the letter enclosed two round-trip tickets and \$20.00 for expenses; the tickets and expense money having been contributed by the grandfather of the wife of the defendant. The defendant refused to return to Rockford from California; the wife of the defendant returned to Rockford, to the home of her mother the latter part of May, 1924, bringing with her

Error to the Circuit Court

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Mary H. Clarey,

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A jury trial was had with a finding in favor of the plaintiff for \$594.00; judgment was rendered on the verdict and the defendant sued out this writ of error.

It appears from the evidence that Wilbur J. Hudler, the defendant, and Frances Rummelhagen were married in Movember, 1922, at St. Joseph, in the State of Michigan. At the time of their marriage the defendant was of the age of 17 years, and Frances Rummelhagen was of the age of 16 years. After their marriage they resided for a short time in Detroit, and then went to Rockford, Illinois, the home of the plaintiff. Upon their going to Rockford, these young people lived with the plaintiff for about five months, and then went to California and resided with the mether and sister of the defendant

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her a round-trip ticket which was cashed in.

The wife of the defendant resided with her mother until early in November, 1925, at which time sne obtained a divorce from her husband. The evidence further shows that on or about June 7, 1924, a short time after his wife returned to Rockford, the defendant wrote her a letter, and among other things said "Keep track of the money your mother gives you, and some day we will pay her and your grandpa back." At the time his wife returned from California to Rockford, the defendant was out of employment and had no funds.

Thereafter the relations between the defendant and his wife became cool and more or less estranged, correspondence was less frequent. In February, 1926, a few months after the divorce had been obtained by his wife, the plaintiff brought this suit. The first notice the defendant had that the plaintiff intended suing him, or making any demands upon him for compensation, came through the attorneys for the plaintiff.

The plaintiff's declaration was based upon the common counts, with an affidavit of claim, stating that the claim was for food, washing, lodging, chattels, and other necessaries furnished by the plaintiff to her daughter, Frances Hudler.

It is insisted by the defendant that the court erred in refusing to admit in evidence, a letter written by the plaintiff to her
daughter and son-in-law, prior to her daughter's return from California. The letter in question suggested to the defendant that
as man he was out of work, he might come back to Illinois, and
get something to do here; that she thought it was the best thing
to do because Frances and her husband's people were not getting
along.

She said for the defendant and his wife to tell the defendant's people, with whom they were living, that she promised to treat Wilbur as good as she could; she would watch him and keep him in good company, and hoped they both accepted the fare home and come home just as soon as they could.

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The letter in question is an invitation to the defendant and his wife, by the plaintiff, to come and live with her. She stated that she had bought a new bed for them, and that she lived in a good neighborhood. The letter suggests defendant and his wife tell Mrs. Osler, the mother of Hudler, she thinks it the best thing to do. It is apparent from this letter, plaintiff felt it was best to get her daughter away from California because of the friction between her daughter and mother-in-law.

In view of the state of the record, we are of the opinion that this letter should have been admitted, as bearing upon the circumstances under which the daughter of the plaintiff returned to Rockford.

The defendant offered in evidence a letter written by the plaintiff to Miss Clarinda Hudler, dated May 10, 1924. The plaintiff identified the latter and admitted it was in her hand writing. In the letter, among other things, she said "If you people can come back to Rockford and find one person that I have ever run Wilbur down to, I would like you to do it. I always praised him to the highest: I have always tried to treat him right: I have invited him to make his home with me; I have offered to do all I can for them; I have even offered to pay one of their fares back to Rockford; as he was laid off and didn't have work; I have offered to buy Frances clothes, as she is naked". Further on in the letter she also said, "Your people don't want her in your family, I am willing to take her back. Tell Wilbur as long as he don't love her and don't want her, tell him her mother does, and tell him to go on through life, to be a good boy." It is mixim evident from this letter that the plaintiff invited the defendant and his wife to make their home with her. She had offered to pay, in part, the expense of returning to Rockford. The tone of the whole letter is that of a woman who was endeavoring to relieve the unfortunate situation in which these two young people found themselves.

No expressed contract is shown to exist between the plaintiff and defendant, and whether or not there was an implied contract depends upon the facts, circumstances, and relationship

The letter in question is an invitation to the defendant and als wife, by the plaintiff, to dome and live with her. She eletted that she had bought a new bed for them, and that had lived in a good neighborhood. The letter suggests defendant and his life tell Mrs. Veler, the mother of hudder, one thinks it the cent thing to do. It is apparent from this letter, plaintiff felt it was best to get her daughter away from Uslifernia because of the friction between her daughter end mother-in-law.

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should have been admitted. It is urged by the plaintiff that the statement of the defendant in his letter to his wife, telling her "Keep track of the money your mother gives you, and some day we will pay her and your grandpa back," Marrants a recovery against the defendant for food, washing, lodging, etc.

It is contended by the defendant that it was not nis intention to pay board for his wife, and that the mother did not expect pay therefor. The statement of the defendant, made in his letter to his wife, should not be extended beyond its ordinary and usual meaning, even though defendant may be liable for actual money loaned to his wife, or paid out for her at her request, for clothing. It certainly should not include board, or other incidental expenses in connection with her living with the family of her mother.

In passing it is proper to say that at the time of the decree of divorce, the defendant, who had come into the possession of some property after his wife had returned to her mother, paid to his wife, about \$2000.00 in settlement of their property rights.

Owing to the failure to admit the letters in question, in evidence, and for the reason that the verdict is excessive, the cause will be reversed and remanded, which is accordingly done.

Reversed and Remanded.

of the parties. It appears to us that both of these letters should have been admitted. It is arged by the plaintiff that the statement of the defendant in his letter to his vire, telling her "Koep track of the money your nother gives you, and some day e will bely her end jour grandps back," Marrants a recovery excinct the defendant for your weating, lodgine, ouc.

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Roverned and remained.

STATE OF ILLINOIS, SECOND DISTRICT	ss. I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
	ict of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the	foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in	
<b>4</b>	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty
	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 642

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 3 1930 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

THE PEOPLE OF THE STATE OF ILLINOIS. Defendant in Error.

-73-

JOSEPH GRIVETTI, Plaintiff in Error.

OF MCHENRY COUNTY

Jett, J.

Joseph Grivettit, Plaintiff in Error, was indicted by the grand jury of the County of McHenry, for a supposed charge of mayhem. A jury trial was had resulting in a finding against the plaintiff in error. Motions for a new trial and in arrest of judgment were made, denied, and judgment was rendered upon the verdict of the jury. Plaintiff in error was fined One Thousand Dollars, and sentenced to the Illinois State Farm at Vandalia, for a period of one year, and to stand committed to said State Farm, until the find and costs were paid.

A number of reasons are assigned for a reversal of the judgment. Owing to the view we take of the case, it will only be necessary to consider one assignment, that is that the court erred in failing to quash the second county of the indictment.

The indictment, as originally returned, contained two counts, the first of which was quashed by the trial court. The case was tried on the second count which reads as follows:-

"And the Grand Jurors, chosen, selected and sworn, in and for the County of McHenry, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that one Joseph Grivetti, late of the County of McHenry and State aforesaid, on the to-wit, 24th day of February in the year of our Lord, one thousand nine hundred and twenty-eight, in a certain room in a house located on a farm owned by one Melvin Lillibridge, in the County and State aforesaid, in which

ELGROR TO THE CINCULT COURT
OF MCHERY COUNTY

THE PEOPLE OF THE STATE OF ILLIMOIS. Defendant in Error.

-EV-

JOSEPH GRIVETTI, PROF.

Jett, J.

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there were divers persons present, and the said Joseph Grivetti, with malicious intent, one, William Liamacher, then and there to maim and disfigure, in and upon the said William Liamacher feloniously did make an assault, and with malicious intent, did then and there bite, with his teeth, the nose of the said "illiam Liamacher, to maim and disfigure, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois."

The statute on which the indictment was based provides:"Whoever, with malicious intent, to main or disfigure, cuts or
mains, the tongue, puts out or destroys an eye, cuts or tears off
an ear, cuts, slits, or mutilates the nose or lip, cuts off or
disables a limb or other member of another person, shall be
imprasoned in the penitentiary not less than one, nor more then
twenty years, or fined not exceeding \$1,000 and confined in the
county jail, not exceeding one year."

It is the contention of the plaintiff in error that the indictment does not charge the offense of mayhem. In that view we concur. The most that can be said of the second count is that the plaintiff in error had a malicious intent to maim and disfigure the complaining witness, and with malicious intent to bite his nose. The indictment fails to charge that the plaintiff in error cut, slit or mutilated the nose of the prosecuting witness. That is the fist of the offense as provided by the statute.

The defendant in error relies upon People vs. Yaskauskas, 268 Ill. 328, to sustain the second count of the indictment. The indictment returned against the plaintiff in error does not contain the allegations or averments, as found in the case relied upon by the defendant in error. Upon reading the indictment as reported in the Yuskauskas case, it is readily seen that it charges an offense under the section of the Statute in question.

It is charged in that case that the defendant, "with

there were divers persons present, and the said Joseph Trivetti, with malicious intent, one, William Liansoher, there into there to maim and disfigure, in and upon the asid William Idansoher feltoniously did make an assault, and with malicious intent, did then and there bite, with its teeth, the noce of the said Alliam Lianschor, in manner as aforesaid, the said William Liansoher, to maim and disfigure, contrary to the form of the Statute in such case made and provided, and against the name and dignity of the same People of the State of Illinois."

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It is charged in that case that the defendant, "with

force and arms did then and there unlawfully, maliciously, and feloniously make an assault in and upon one Katarina Yuskauskas,\*\*\* with the unlawful, malicious and felonious intent to then and there maim and disfigure the said Katarina Yuskauskas, \*\*\* with the teeth of him, the said Willem Yuskauskas, did then and there unlawfully and feloniously mutilate the abse of said Katarina Yuskauskas, \*\*\* with the unlawful, felonious and malicious intent to then and there and thereby, and in the manner aforesaid unlawfully, maliciously and feloniously maim and disfigure the said Katarina, Yuskauskas."

We therefore conclude that the second count of the indictment, on which plaintiff in error was tried, failed to charge the offense of mayhem, and the judgment of the circuit court of McHenry County is reversed.

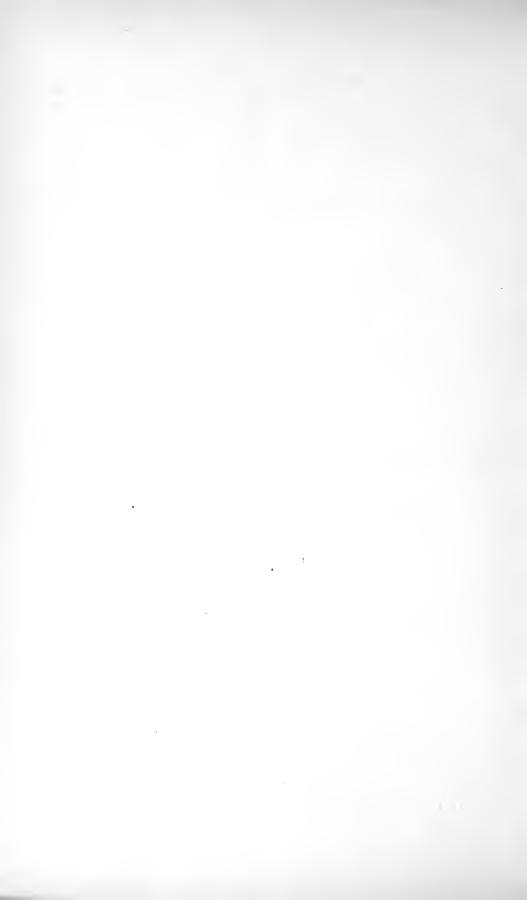
Judgment reversed.

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Jud ment reversee.

STATE OF HINDS	)
STATE OF ILLINOIS,	88.
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second Distric	ct of the State of Illinois, and the keeper of the Records and Seal thereof,
	foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in	
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty
	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice. JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff. 255 I.A. 6 122

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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In the Appellate Court

of Illinois

Second District

October Term, A.D. 1929.

Harry B. Brown, Administrator of the Estate of Catherine Brown, deceased,

appellee,

VS

Appeal from the Circuit Court

of La Salle County.

The Chicago, Rock Island & Padific Railway Company, a corporation,

appellant.

Opinion by Boggs, P. J.

An action on the case was instituted by appellee against appellant in the circuit court of La Salle County to recover for the death of appellee's intestate, alleged to have been caused by negligence on the part of appellant. The declaration consists of three original counts and one additional counts.

The first count charges that Aurora street in the city of Marseilles interesects appellant's tracks at right angles; "that the defendant caused a warning bell to be placed near said crossing, to be rung when trains were approaching, and provided a crossing flagman, who should \* \* \* warn persons of approaching trains; that it was the duty of defendant to give due warning of the approach of trains toward said crossing by ringing the bell or blowing a whistle for at least eighty rods from such crossing and continue the same until said crossing was reached, and to cause its signal bell to be rung and to provide that the flagman give due notice to persons approaching said crossing; that it was the duty of the

In the Appellate fourt of Illiands
Second District
Cotober Term, A.D. 1920.

Harry B. Brown, Administrator of the Estate of Catherine Prown, deceased.

applequa

SV

The Chicago, Rock Telend & Pacific Hailway Company, & componention,

appellant.

Opinion by Roggs, P. J.

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Appeal from the Circuit Court of La Salle County.

defendant to cause its trains to be run at a reasonable rate of speed and its passenger trains not to exceed ten miles per hour; yet, the defendant neglected all of said duties and carelessly and negligently in the nighttime of the day aforesaid, at the hour of seven o'clock P. M., operated one of its passenger trains westerly along its said tracks over and upon said Autora street at a high and dangerous rate of speed, \* \* without \* \* blowing a whistle or ginging a bell, for a distance of eighty rods from said orossing, and failed to have its flagman attending said crossing, " eto.

The second count is based on a charge of general negligence.

The third count charges a want of "due notice and warning of the approach of said train, and on account of the absence of the flagman," etc. The additional count charges wilful and wanton conduct on the part of appellant in the operation of its said train, etc.

To said declaration appellant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee in the sum of \$4,000. To reverse said judgment, this appeal is prosecuted.

Appellant's railroad consists of two main tracks, running in an easterly and westerly direction through said city of Marseilles, which tracks are practically straight for several miles on either side of said city. The northerly track at the Aubora street crossing is the west bound track, and the southerly is the east bound. Aurora street runs north and south, and intersects said tracks at right angles, some 400 feet east of appellant's depot. Main street, the first street west of Aurora street, is some 400 to 450 feet west of said depot. Washington street in said city runs east and west parallel to and about 55 feet north of appellant's railroad tracks. On the east side of Aurora street is a plank sidewalk, five feet wide, for pedestrians. There is a crossing bell located south of the east-bound track and west of Aurora street, which is

defendant to equipe the trains with the second the miles for soon; speed and its passenger trains with the exceed ten miles for soon; yet, the defendant no, leaded all of said inties and oralisal and neglig ofly in the nightains of the day eforce in, of the tent of sover of slook N. N., operated one of the passence or settler of tracks over and upon self informations at a light and capture of slook. The of slook of the said intent of the star altered at a which and capture of slook for a light and the second of the said and all stars and infied to have ten illustration of eight and orasis.

The governt count is based on a correspondence in equipment. The third count charges a vent of "don notice and cancia, or take any roach of out- train, and so assume ourse or the custom of other or the flagman," of a the statistic real count of argas wilth I ame concerned dust on the great of appellant in the correction of the sold break, etc.

To said lowleration appoint filed a plan of the ement in isome. A trial was had, no mittee in a vordict one galerant in favor of appoint in the sear of [4,000. To reverse will from nt, this appoint in procession.

in an energity and process, will action of the open a tracks, where the interest in a case of the energy and process, will action for our interest of the energy and process and the tracks of the energy and the energy of the en

operated by a battery. A flagman's shanty stands six feet east of the sidewalk and eight feet north of the north rail of the west-bound track. At the time in question the flagman, whose name was Ross, list his life in attempting to rescue appellee's intestate. As one approaches the tracks on Aurora street from the north, there are no obstructions to the view either to the west or to the east, except said flagman's shanty.

The decedent, Catherine Brown, seventeen years of age, with her sister Marcella, aged twelve years, lived north and east of Aurora street. On the evening in question, the decedent and her sister started from their home to the Cozy Theatre, located on Main street, south of said tracks. They walked west on Washington street to the East side of Aurora street, thence south to said tracks, where appellee's intestate was struck and killed by an engine on the west-bound track.

It is first contended by appellant that the court erred in refusing to exclude the evidence and direct a verdict in its favor at the close of appellee's evidence. It is insisted that said evidence, taken as true, with all reasonable inferences to be drawn therefrom, does not fairly tend to prove the averments of appellee's declaration.

We are not prepared to say that, on a motion to direct a verdict, appellee's evidence does not fairly tend to prove the averments of the negligence counts.

A separate motion was made with reference to the willful and wanton count. In support of this count appellee insists that the speed of the train was excessive; that there was a failure to blow a whistle or sound a bell; that the crossing bell was not ringing; that the flagman was not in the performance of his duties; and that the train was being operated with a dim headlight; that, from these facts and circumstances, the jury would be warranted in finding that appellant was guilty of willful and wanton conduct.

operated by a britery. A flagman's shart, wends six the cost of the silewalk and sight foot nowth of the north real of the rost. bound track. At the time in question the flagman, whise area, a hose, lies his life in attacher to reams appelled a interior. As one approaches the tracks on turous street from the entity, here are no obstanctions to the view either to the west or to the sapt.

The december Parcells, speak trains plans, aventeen yours of and set of with her mister Parcells, speak trains should set of set of strong street. On the evening in your site decodes and the sister started from their home to the South started from their home to the South started tracks. They walked next on rabinston street to the Rest eide of intest to wave couth to a literal wave appelles intestate we street out that the an explor on the west-bound areas.

It is first contented by a palisht the court ered in refusing to exclude the criteria and discrite vertical in its if or its expected to the if out of the citeria and the citeria and true, with all reasonable information to be from the fairly toud to prove it according to the information.

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And wanten sount. In support of this count upy when indicts that the apost of the training and of this that the count of hell; that the count of hell and the fact that the training out out in the restame near of the Count that the training head of the training head of the training that the count of the count of the training that the count of the count

Morgan Young, in behalf of appellee, testified that on the night in question he was employed at an oil filling station about 150 feet north of said tracks and some 200 feet west of Aurora street; that he was waiting on a customer and did not notice either train come in; that, from the distance the west-bound engine was standing west of Aurora street, he judged that it had been running 25 to 30 miles per hour at said crossing. On motion, the testimony of this witness with reference to the speed of said train was stricken. He further testified that he did not recall whether or not he heard the whistle; that he was busy around the station and did not pay any attention to the train until he saw it stopped short of the station.

Agnes O'Neil testified that she lived about a block east of Aurora street, and something like 500 to 600 feet north of appellant's tracks; that on the night in question she was in her kitchen, washing dishes, and "did not hear any train whistle for any crossing within half an hour before " the accident.

James Wier testified that he lived 100 feet north of appellant's tracks; that on the night in question he was at home and "I was sitting in the living room, on the south side of the house, six or eight feet from the sidewalk. I did not hear any train whistle"; that he went down to the crossing, and the west bound train was standing on the track, with the last car of the train on the crossing and the engine about at the depot.

James Mitchell testified that on the night in question he was near the depot, waiting for the train; that he heard both trains some in but did not know how fast they were running; "I was looking at the headlight of the east bound train. When the train back of me blowed I did not look back because I looked at the station to see if I would be in the clear. When the light brightened up I looked back and I saw a lantern go out like that —I saw a kid run like that, and I saw the lantern go out like that." This

Morgan Young, in behalf or appelled, testified that on the night in question to we employed at an oil filling station atoms 150 feet parts of said tracks and send send feet lest of surers street; the to was waiting on a custom rand this not notice either train ocus int the tests, from the discense that lestine estimates at a discense that lestine rest of the or for the rest of the state of the self-board or the running 25 to 30 miles per lest at a the said troughter. On notice, the testimony of this vibroun with reference to the spect of a 11 test mass attribute. He further testified the best that not need the settion or not he break the way busy around the station and did not pay any attention to the train until he say it stay at about of the each of the sayin and the sayin about of the sayin.

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witness testified that at the time of the trial he was employed by appellant as a crossing watchman. On cross examination he testified that he heard the west-bound train whistle, more than once; that the west-bound train stopped with its engine a little bit east of the station.

Marcella Brown testified that she and the decedent on the night in question, left their home about 7:10, to go to the Cozy Theatre, on Main street, south of appellant's tracks; that they went south from their home am to Washington street, then west on Washington to Aurora, and south on the sidewalk on the east side of Aurora; that in crossing Washington street; Catherine got a couple of steps ahead of her. "After I got on to the east side of Aurora street I looked east to see if any train was coming, and there was none coming. There was a train coming from the west. We walked on until we got to a few feet from the crossing and then a train came from the east. I did not see any flagman there before I saw the train. My sister was about two steps ahead of me. I looked, and I saw the train coming -- it was almost there, and somebody with a green lantern ran out of the shanty. He went behind me and I turned and ran back. I did not see any flagman before that time. I did not hear the train whistling or any bell rung. I did not hear any bell ringing at the crossing. \* \* \* I did not see my sister after I saw this train. She was hit by the train. I did not see the train hit her."

This witness further testified that the crossing bell at the Aurora street crossing did not ring that night; there is an electric light at Aurora and Washington streets; that it was not burning, and that it was a dark night.

This was substantially the evidence offered by appellee.

This evidence, taken as true, with all reasonable inferences to be drawn therefrom, does not tend to prove willful and wanton conduct.

Illinois C. R. R. Co. v. Lenier, 202 Ill. 624; Heidinreich v. Bremer, 260 Ill. 439; Brown v. Illinois Terminal Co. 215 App. 454; Bernier v. Illinois Central R. R. Co., 215 App. 454; Richardson v. Franklin

witness testified that at the time of the trial he was employed by appellant as a crossing watchman. On eross examination he testified that he heard the vest-bound train whistis, more than ence; that the west-bound train atopped with the engine a little hit each of the station.

Warrents Brown testilied that are and the december on the night in russion, loft their home chook 7:10, to to the Coxy Theatre, on Min atreet, south of appalisht a tracker tout bloy went south from their home we to liminghon attent, This wast on Tashington to lurors, and wouth on the wideralk on the cast side of Aurora; that in mossing 'askington street; Catharine for a couple of steps about 10 hear. "Atter I got on to the cest cide of Aurora street I looked east to see if say train was negting and there was none coming. There was a train coming from the wast. e walked on until we got to a few feet from the erousing and tien a train came from the east. I did not see any flaggen there before eaw the train. If alster wa about two ateps whead of me. I leckthedenev are the coming-it was aloud and ear I have . De with a green lentern ran out of the stanty. He were belief me and I turned and ren beek. I did not see any flagman before that "thes. I did not near the train whiching or any bell runs. any bell ringing at the erosuing. " " I dit not see my nigher after I saw this temin. The was old by the train. I hid not see the train hit here"

This witness Surther testifict that the acousty belt at the furors etrope is the the three street or such all not ring that that there is the slowering limb of trope and table arms are stated if when a dark angle.

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Tale was entrated the orlines ordered in none and the Tale solution of Tale evidence, but no bruce, with all reasonable intermined to be drawn therefrom, does not tend to prove willing and mathematical in the Transport Tilinois To Tale 10 Tile 324; Felding in the Transport 280 lile 433; Trome v. Tilinois Torder for the formula to the transport Tilinois Central T. T. To., 213 ye. 454; the creater to the transport to the transpor

235 App. 440-447. In Brown v. Illinois Terminal Co., supra, the court ag page 331 says:

"A willful or wanton injury must have been intended, or
the act must have been committed under circumstances exhibiting a
reckless disregard for the safety of others, such as a failure,
after knowledge of the impending danger, to exercise ordinary care
to prevent it, or a failure to discover the danger through negligence
or carelessness when it could have been discovered by the exercise
of ordinary care."

The court therefore erred in failing to direct a verdict on the willful and wanton count.

It is further insisted that the verdict is against the menifest weight of the evidence. Inasmuch as the case will have to be retried, we refrain from discussing the question of the weight of the evidence.

It is also insisted that the court erred in giving the first and second instructions given on behalf of appellee.

As to appellee's first given instruction, it is insisted that its effect is to assume the exercise of ordinary care on the part of appellee's intestate for her own safety, instead of submitting that issue to the jury. Inasmuch as the effect of this instruction is to direct a verdict, we are of the opinion that the objection is well taken.

Appellee's second instruction is as follows:

"The court instructs the jury as a matter of law, that by wanton and wilful misconduct, as used in these instructions, is not meant malice, ill will or hatred, but it meant that kind of conduct which tends to show a gross want of care and regard for the rights of others".

In the view we hold of this record, the giving of any instruction on willful and wanton conduct was not proper, as the court should have directed a verdict on the willful and wanton count.

288 App. 440-447. In Brown v. Illinois Terminal Co., engrs. the court he page 281 augs:

"A willful or wanten injury must have been intended, on the net must have been consitued under circumstances exhibiting a reckless disregard for the enfety of others, much an a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger investigance or exclosured the deviation of extinctly care.

The court therefore errei in triling to direct a resudict ca

It is further included that the verdies is against been and in the collect to the manifest to the vidence. Increased up the cost the weight to be retried, we retried to the action of the evidence.

It is slee insinted that the court error in civing the

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"The enert instructs the jusy see a sector of law, that by wenters and will's alsocature, is not been and on its will at the sector of the sink of contact which tends to show a greek want of second of second support for the sink of second of second support for the sink of second support.

In the view we held of this resert, the plant of our listingt.

100 on willful and wenton condact was not properly as the court another than directed a verdict on the will all are rest. I seemt.

However, it may be said that the court errod in giving this instruction, as it does not correctly state the law with reference to what constitutes willful and wanton conduct. Illinois C.R. Co. v. Leiner, supra, 631; Heidenreich v. Bremer, supra, 446; Bernier v. Illinois C. R.R. Co., supra, 457; Killalay v. Hawk, 250 App. 222-229.

Lastly, it is insisted that the court erred in refusing to give appellant's refused instructions 26 and 28. Instruction 26 is as follows:

"If the jury believe from them the evidence that under all the facts and circumstances surrounding said Catherine Brown shown by the evidence when she was walking on the sidewalk, approaching the crossing of said sidewalk and said railroad, ordinary care and caution required that she should look and listen to ascertain whether any locomotive engine and train of cars was approaching said crossing from the east within such distance as to make it dangerous or unsafe to walk upon the said \*\*manned\* crossing, then it was the duty of said Catherine Brown to look and listen before walking upon said railroad at said crossing; and if the jury believe from the evidence that said Catherine Brown neglected or failed to do so, and that if she had so looked and listened she would have discovered the approach of said locomotive and train of cars in sufficient time to have avoided the injury, then the plaintiff cannot recover under the first, second and third counts of the declaration."

This instruction states a correct principle of law, and the court erred in refusing to give the same. Chicago City Ry. Co. v. O'Donnell, 208 Ill. 267-275-276; Fowler v. Chicago & E.I.R.R. Co., 234 Ill. 619-624; Weber v. Chicago B. & Q. R.R. Co., 142 App. 550-558; Ohlwein v. Osborne, 176 App. 324-328; Greenwall v. Baltimore & O. R.R. Co. 332 Ill. 627-632.

There was no error in refusing to give appellant's instruction 28.

Cross errors were assigned, in one of which it is contended

Noverer, it may be wild that the court errod in givin this instruction, as it does not serreatly state that it is a reconstant to what constitutes willful and senten conduct. This sis out.

v. Leiner, supre. 631; Tridenreich v. Brower, supre. des lorrier t.

Llinois J. R.N. Jo., supre. 457; Ellislay v. Mark, 256 top. 325-223.

lastly, it is indialed that the sourt arred in refunding or give appollant's refused inappuration . I the salination . I the sa

"If the jury believe from Mark the estdemon that water all the factor and elementariness entrounting and telephorine and approach to the streeting of said hidserly and said religion, ordinary and put ordinary of said hidserly and said religion, ordinary and put occurring of that the chart look and tiles to succession wither any located that the chart of any are approached and or any located the said train and describe the said and the factor of said from the unsafe to walk upon the said areasers areasing, then it was to describe of said from the fact and fact and the fact that ordinary and if the jory believe from the fact of the fact that are said ordered that the fact or factor of said laterine from heldestee or factor in a second and the train of one of the train of one of the court that the constitution the train of ordered the injury, then the placetial conset and the train of ordered the injury, then the placetial conset and the train of the train the conset and the train of the train of the conset and the train of the train of the train of the train the placetial conset and the train of the train of

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that the court erred in giving appellant's instruction 16, which is as follows:

"The court instructs the jury that the additional count to the original declaration charges that the defendant willfully and wantonly killed the deceased."

This instruction would tend to mislead the jury, and the sourt should not have given the same.

It is also insisted that the court erred in striking out certain testimony offered on the part of appellee. We have examined the record in this connection and are of the opinion that the court did not err in said ruling.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

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For the reasons above set forth, the judgment of the trial court will be reversed and the names will be remanded.

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Reversed and resended.

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STATE OF ILLINOIS,	
SECOND DISTRICT	I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second Distric	et of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the f	oregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in	
entitled cause, or record in	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty-

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.  $2551.A.642^3$ 

BE IT REMEMBERED, that afterwards, to-wit: On JAN at 1336 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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in. -- Controtto

Fred J. Braid, Administrator of The Estate of Glen L. Braid, Deceased,

apiellee,

-VS-

Osborne Oil Company, a Corporation, appellant

Apreal from the Circuit Court of Winnebugo County

Boggs, P. J.

An action on the case was instituted by appelled as administrator of the estate of Glen L. Braid, deceased, in the circuit court of Winnebago County against appellant, to recover pecuniary damages to the next of kin for the death of said deceased, charged to have been caused by the negligence of appellant.

The first count of the declaration charges general negligence on the part of the driver of a truck owned by appellant. The second count purports to be a willful and wanton county. The third count charges that the driver of a truck owned by appellant was operating the same more than one hour after sumset "without light ted headlights". The fourth count pleads an ordinance of the city of Rockford with reference to carrying lighted lamps, etc., on motor vehicles, and charges a violation thereof.

To said declaration appellant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee for \$9,000. To reverse said judgment, this appeal is prospected.

Appellant's intestate, who at the time in question was some twenty-one years of age, was the owner of a Graham-Paige sedan. On December 20, 1928, about 7:00 to 7:30 P. W., he, with his mother, Mertha Braid, and a brother, Leslie Braid, then about seventeen years of age, was driving south on North Main Street in the city of Rockford. Appellee's intestate was driving, the moth-

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er was sitting in the center, and the brother Jeslie on the right.

A switch track crosses Main Street in an easterly and westerly direction at the northern extremity of said city, the south rail of said track being in the city limits and the north rail outside. Connecting with Main Street and Amning north from said track is a paved State highway, with a black lime running down the center thereof. There was also a black line extending south from said track, down the center of Main Street. Me in Street is/paved street, some forty to fifty feet in width at the point of the collision. The record discloses, and it is practically conceded by the parties, that, south from said switch track, on Main Street, it is a closely built up district, there being business buildings and residences on both sides of said street. The warehouse or station of appellant, who is a gaged in the cil business, is located on the west side of Main street, a short distance south of said switch track.

On the evening in question, the driver of one of sppellant's trucks was proceeding north on Vain Street. It a point
a short distance south of said track, the automobile driven by
appellee's intestate collided with said truck, resulting in a fatal
injury to appellee's intestate, and in more or less serious injuries to the other occupants of said automobile.

Numerous errors were assigned on the record, many of which were not referred to in the argument. One of the errors assigned is that the court e red in refusing to exclude the evidence and to direct a verdict in favor of appellant, on motions to that effect, made at the close of appellace's evidence and again at the close of all the evidence. In this connection it is stremuously urged that there is no affirmative proof of the exercise of ordinary care on the part of appellace's intestate.

There was some testimony that appellee's intestate was looking south through the windshield, just prior to the time of said collision. The other occupants of the our testified that they were also looking south, and did not see appellant's truck, or any lights. Without going into a detailed discussion of the evidence

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we do not feel warranted in holding that the court erred in refusing to direct a verdict.

It is also insisted for a reversal of said judgment that the court erred in permitting testimony to go to the jury, over the objection of appellant, t the effect that appellee's intestate was a regular attendant at Sunday school, church, etc.

The right of recovery in this character of case is limited to the pecuniary loss suffered by the next of kin of the deceased. North Chicago S. R. Co. v. Brodie, 156 Ill. 217-320; Chicago, P. & St. L. R. R. Co. v. Woolridge, 174 Ill. 330-355; Wilcox v. Bierd, 330 Ill. 571-581.

Wental and physical characteristics and capacity to be of service, habits of industry and sobriety, carning capacity, etc., are all elements proper to be considered in assessing the pecuniary loss sustained. City of Chicago v. Schloten, 75 Ill 408-472; Betting v. Hobbett, 142 Ill. 72-77; O'Fallon Coal Co. v. Laquet, 198 Ill. 125-128; Murgarbo v. Chicago, B. & C. R. R. Co., 239 App. 544-552. Some of the cases have held, where the suit involved the death of a father, that it was proper to show the moral and religious training which the father was giving to the next of kin, his children. Benson v. Chicago City Ry. Co., 208 App. 613-615; O'Fallon Coal Co. v. Laquet, supra, 128. That rule, however, would not go to the extent of making proper proof of a persont Characteristics with reference to his attending church and Sunday school. The court erred in admitting said testimony.

It is also insisted that the court errod in refusing to give appellant's first refused instruction, which is as follows:

"The Court instructs the Jury that the statutes of the State of Illinois, provide as follows: 'Upon ap reaching my highway crossing and railroad at grade, the person controlling the movement of any self-propelled vehicle shall reduce the speed of such vehicle to a rate of speed not to exceed ten (10) miles per hour.'

"The Court further instructs you that this is a val il and subsisting law of the tate of Illinois, and that, if you be-

with the appearance of the

grant the grant of any of the fact that the the state of the s and the control of th and green to greening and it is the the other than the state which

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A STATE OF THE STATE OF THE STATE OF THE STATE OF with the great hand a training of the control of th lieve from the evidence in this case that deceased, Glen Braid, just before and at the time of the callision was driving his automobile at a rate of speed in excess of ten miles per hour and in violation of this law, and that said driving at a rate of speed in excess of ten miles per hour and in violation of this law was the proximate cause or in any degree contributed to bring about his injury and death, then the Court instructs you to find the defendant, Osborne Oil Company, not guilty."

This instruction is not carefully worded, but, in the main, it states a correct principle of law. However, the applicability of this instruction depends somewhat on the evidence with reference to where the collision in fact occurred with reference to said track. Inasmuch as the testimony of appellant tends to show that the collision took place at a point only about twenty-five feet south of said track, and as appellee's witnesses testified that said automobile, at the time it crossed said tracks, was traveling twenty-five miles per hour, we hold that an instruction of that character was proper to be given.

One of the principal grounds relied on for a reversal of said judgment is that counsel for appellee, in the argument to the jury, used xx language, the necessary effect of which was to inflame the minds of the jury. Among other things, counsel for appellee stated:

"That mother sitting there between those two sons, according to the testimony here, it was twelve below zero, undoubtedly a cold night. They were coming from the country. One thing she knew she had. She had a boy that she had nursed from her breast. She had a boy that had grown up under her tutelage to manhood. She had a boy—and it was strange that my friend, Mr. Knight, all the time was objecting because I wanted to show the character of that boy, which is one of the principal elements in this case. \* \* \* \*

"The had a boy that she could absolutely trust. She could put her hand on his shoulder and say at any time, "My son, I trust you. You have gone to school; you have gone to a school as far as people in ordinary circumstances can afford to send you, you

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have attended the Sunday schools and the churches, 'and genthemen of the jury, that is a mighty good place for our boys and girls to be. If they were all there instead of being in pools halls and on golf courses we would not have so much crime among our young blks.

\* \* \* You have no right to consider any evidence that there was a railroad track or t at they drove up to t is railroad track at twenty miles an hour, or at any other rate. That is not an issue in this case and you is we no right to consider it and it isn't proper to be argued. \* \* \*

"Most of us are married and have families, you all
know what your children are to you, and you know what the love and
affection of your wife, the mather of your children, is. You know
that if you had a hundred children and somebody was to kill one of
them you could not select the one you would want to be killed. You
all know that, and it isn't necessary for me to elaborate on m d
discuss a matter that is so plain, so self-evident, so selfasserted in the minds of every man. \* \* Gentlemen of the jury, I
want to bring this home to you. I want you to think of this, -here is this mother sitting in that oar between her two sons, riding
along in perfect security. \* \*

"So that the fact that this young man had the fear of God and the love of the Supreme Being in his heart doesn't detract anything from t is situation that I am going to picture to you; doesn't take from that boy's character nor from his stending up to the time of his awful and sudden death. But that mother sat there beside that boy, who, when he entered the home in the evenin after his day's work and received a kiss from her dear lips she knew that he had not been out robbing or destroying human life."

At this point counsel for appellant objected. The court overruled the objection, saying: "I think he has a right to owment on the evidence." Thereupon counsel proceeded:

"His cheerful voice, to expression of his counter ance," of a powerful physique, the vigor of young manhood brought
a cheer into that home when he came in there, and it remained there

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ు గ్రామంలో కాట్లు ఇంగు కాట్లు గ్రామంలో కి.మీ గ్రామంలో కాట్లు కాట్లు కాట్లు కాట్లు కాట్లు గ్రామంలో కాట్లు కాట

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until he left."

"This kind of argument cannot be justified, and, if willfully persisted in, will justify the reversal of a judgment, even though the court has sustained objections to it. It is of itself sufficient reason for granting a new trial." Bale v. Chicago J. Ry. Co., 259 Ill. 476-432; Appel v. Chicago City Ry. Co., 259 Ill. 561-567; Bishop v. Chicago J. Fy. Co., 289 Ill. 63-71.

Where the record shows that an attorney has deliberately and repeatedly indulged in prejudicial argument to the jury, the effect of such misconduct cannot be measured, and the only remedy is to grant a new trial. Eshelman v. Rawalt, 298 Ill. 192-195; Bishop v. Chicago J. Ry. Co., supra, 71; Illinois P. & L. Corp., 311 Ill. 123; Mattis v. Klewans, 312 Ill. 299-310.

It is error for counsel to attempt in an argument to have the jury put themselves in the position of one of the parties. Thomas v. Illinois P. & L. Corp., 247 App. 378-398.

It is not necessary that a verdict be excessive in order to reverse a judgment on account of inflammatory and prejudicial argument of counsel. City of Centralia v. Ayres, 135 App. 290-294; Westbrook v. Chicago & N. W. R. R. Co., 248 App. 444-451.

Where counsel has objected to a line of argument, as was done in this case, he is not bound to renew his objection to each remark in that line, in order to assign error thereon. Chicago U. T. Co. v. Lauth, 216 Ill. 176-180. In this case, the court not only failed to sustain an objection to the prejudicial remarks, but overruled the same.

The whole purpose of the law to obtain a trial by a fair and impartial jury is defeated if appeals to their passion and prejudice are to be permitted during the course of the trial.

Bale v. Chicago J. Ry. Co., supra; McCoy v. Chicago & A. R. R. Co., 263 Ill. 244-248; Chicago & A. R. R. Co. v. Scott, 232 Ill. 419-423; Faulsen v. McAvoy Brewing Co., 220 App. 273-290.

As appelled's right of recovery in this case was limited to the pouniary demages to the next of kin, the remarks of counsel as above set forth are of such inflammatory character the t,

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in md of themselves, they would be sufficient to warrant a reversal of this case.

Error was assigned on the giving of appellee's instructions. However, this assignment of error was not referred to in the argument.

It is also insisted that the court, on the motion for a new trial, should have considered certain testimony taken at the coroner's inquest. Inasmuch as the cause is being reversed and there will be a new trial, it is not necessary for us to discuss this assigment of error.

we will not discuss the weight of the evidence, either on the issue of the due care of appellee's intestate or of negligance on the part of the driver of appellant's truck, other than to say it is conflicting, and that it was of such character that, in order to sustain a verdict, the record must be substantially free from error.

The judgment of the trial court will therefore be reversed for the ruling of the court on appellant's first refused instruction, the rulings on the evidence, and the argument of coursel for appellee as above set forth.

Reversed and romanded.

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STATE OF ILLINOIS,	\$8.
SECOND DISTRICT	I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District	of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the fo	oregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in	
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty
	Clerk of the Annellate Court



A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff. 255 I.A. 6424

BE IT REMEMBERED, that afterwards, to-wit: On JAN 25 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



LENA GILL,
APPELLEE.

Vs.

APPEAL FROM THE CIRCUIT COURT OF KNOX COUNTY.

NORTH AMERICAN UNION, A CORPORATION.

APPELLANT.

Jett, J.

Lena Gill, appellee, brought suit against North American Union, a corporation, appellent, in the Circuit Court of Knox County, to recover on a certificate in a fraternal benefit society in the sum of \$1,000.00.

Appellee, in her declaration, avers that Robert G. Gill, the insured, for whom the plaintiff was beneficiary, was a member of the North American Union, and the holder of a beneficiary certificate, issued by the North American Union. The certificate among other things provides, that upon the death of the insured while a member of the North American Union, and providing he had not violated any of the laws of the North American Union, the North American Union would pay his beneficiary the sum of \$1,000. The certificate also provides:- "In consideration for of the application of Robert G. Gill herein called the insured, for membership, the statements, agreements and warranties, and each of them made and subscribed to in the said application in the medical examination blank, and the answers made to the medical examiner, each and all of which are hereby declared to be warranties, and of the further agreement to abide by and be bound by the constitution, laws, rules and regulations of the North American Union as now in force, or as they or any of them may, from time to time be modified or changed, or such as may hereafter be enacted or adopted, all of which are hereby made a part of this contract, the said North American Union agrees and promises to pay to Lena Gill, wife of the insured, the sum of \$1,000 less any indebtedness, lien, interest or other charges due the Society. Said payments will be made at the home office in the City of

AF LAN JEOU YOU SHOUTH OF THE COUNTY.

LENA GILL, APPHILLEM.

Vs.

NORTH AMERICAN UNION, A COLPORATION, APPELLAUF.

Jett. J.

Lone Gili, appelies, bright our sector hout worth worth numberion, a corporation, appellent, in the trust Courty of thus Sounty, to recover on a certificate in a fre ernal boneff.

society in the sum of 1,000.00.

Appellos, in ner declaration, avers they Robert . . ill the insured, for whom the claimsiff was beneficiary, was manher of the Worth American Union, was the holder of a bu effetage certificate, issued by the Worth American Inton. The certificate among other things grovides, that upon the death of the incomed while a member of the Morth American Inton, and providin he had not violated any of the laws of the darth tannican faith, the North American Thion would pay his beneficiary the sam or 1,000. The certificate clas providen: "In sansideration for the spale cation of Fobort G. Gill herein call d the insured, for c.bership. the statements, agreements and marrenties, one erm of them add and subscribed to in the said application in the teriol . Trains ation blank, and the enswers sade o the adjocal van inter. each and all of thick are beneby deals of to the set of the thing this of the further agreement to abide of and be bound on the cat in some laws, rules and regulations of the Morth Aurican Tolon: Or in-force, or as they or any of them in, if in the in the o rodified or changed, or such as may hercefter he enabled is adopted, all of which are hereby rade a ort of this cold, the build Morth American informagnoss and american to a do-Lens Gill, wife of the incared, the say of 1,000 to the debtedness, lion, interest or other elerges do de voice. Said payments will be made at the Lond office in the "i o

Chicago, State of Illinois, upon receipt of and approval of satisfactory evidence of the fact and of the cause of the death of
the insured: provided, however, that the membership of the said
insured and this certificate, which has been issued in evidence
of such membership, are at the time of death of insured in full
force and effect in accordance with the constitution, laws, rules
and regulations of the said North American Union, and provided
this certificate has not been previously surrendered, forfeited
or cancelled."

The beneficiary certificate contains certain conditions of payment among which was the following provision; "The insured hereby agrees for himself or herself, or for any person or persons that may have or claim any interest in this certificate, that in case his or her death shall occur by his of her own hand, or act, while either same or insame, or in consequence of any civil disorder, the limit of recovery hereunder shall be the amount of his or her contribution to the mortuary fund of the Society, not exceeding one half at the face amount of the certificate, less any pre-payments or indebtedness (including liens and interest threon,) chargeable or charged to this certificate and due the Society."

It is further avered in the declaration that the said Robert G. Gill complied with all the conditions of the certificate and that he died on the 30th day of August, 1938, and that the beneficiary furnished proofs of death to the defendant, the North American Union; that the North American Union offered to pay to the plaintiff and to deliver to the plaintiff, its check for \$347.45 in full payment of all its liability, and that the plaintiff returned the check to the North American Union, and refused to accept the same.

To the declaration the appellant pleaded the general issue and a special plea setting up that the North American Union was a fraternal beneficiary society, organized and existing under and by virtue of the laws of the state of Illinois; that it was organized not for profit but for the sole benefit of its members and their beneficiaries; that it had a ritualistic form of work

Chicago, State of Illinois, upon receipt of and approval of satisfactory evidence of the fact and of the cause of the deeth of the insured: provided, however, that the manbership of the said insured and this certificate, which has been issued in evidence of such membership, are at the time of death of insured in full force and effect in accordance with the constitution, laws, rules and regulations of the said North American Union, and provided this certificate has not been proviously surrendered, forfeited or cancelled."

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It is further everic in the declaration that the said Robert G. Cill complied with all the conditions of the certificate and that he died on the Soth day of August, 1928, and that the beneficiary furnished proofs of death to the defendant, the North American Union; that the North American Union offered to pay to the plaintiff and to deliver to the plaintiff, its sheek for \$347.45 in full payment of all its liability, and that the plain accept the check to the North American Union, and refused to accept the some.

To the declaration the appellant pleaded the general issue and a special plea setting up that the North American inion was a fraternal beneficiary scalety, organized and existing whice and by virtue of the laws of the state of Illinois; that it was organized not for profit but for the sole benefit of its members and their beneficiaries; that it had a ritualistic form of work

and representative form of government; that it has a constitution and by-laws, and that the constitution and by-laws entered into and formed a part of the contract between the members and beneficiary and the North American Union; that the by-laws of the North American Union in part provided, "If a member shall die by his own hand, or act, either same or insame, such death shall forfeit any and all rights and claims to the amount agreed to be paid on his death, and specified in the benefit certificate of such member and the beneficiary shall receive and be paid in lieu thereof, a sum equal to the total amount actually maid by such member to the mortuary and reserve funds of the Order, unless it is otherwise provided in and by the benefit certificate of such member, issued prior to the taking effect of this section."

that the insured, the said Robert G. Gill, for whom the plaintiff is beneficiary, came to his death by suicide, and that the death of the said Robert G. Gill was caused by his voluntary act, and that he died by his own hand committed with the intention of taking his life and that by reason of the fact that the insured committed suicide and took his own life, the only sum that the plaintiff was entitled to recover was the amount paid by the insured into the Mortuary Fund, which was the sum of \$347.45 mm which said sum the defendant offered to pay and is still willing to pay the appellee.

on the trial of the case before a jury a finding was had in favor of appellee in the sum of \$1,000, and the appellant prosecuted this appeal. Appellant insists that the court erred in refusing to admit certain evidence bearing upon the question as to how the insured came to his death.

It appears that the coroner's verdict, coroner's report of evidence and the certificate of vital statistics and affidavit of appellee, were made part of the proofs of death by appellee, the beneficiary herein and were by her caused to be sent to the North American Union as her proofs of death. The trial court was of the opinion that the proofs of death were not admissible in evidence, and refused to admit any part thereof.

and representative form of govern lent that it has teams to tion and by-laws, and that the constitution and ig-laws entered into and formed a part of the contrast between the isombers and beneficiary and the North American Union; that the bolaws for he worth American Union in part provided, "if a member that die by his own hand, or act, either same of insure, such desthability forfeit any and all rights and claims to the amount agreed to be paid on his death, and appealfied in the benefit servificants of such member and the benefit of the total amount netwalls if in lieu thereof, a sine equal to the total amount netwalls if it is otherwise provided in and reserve funds of the inter, which as such member, issued prior to the taking offers of this section."

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It is the contention of the appellant that the parties to an insurance policy or certificate have a right to make any agreement they choose.

The proofs of death furnished by the appellant required the furnishing of these documents and the plaintiff adopted the same and vouched for the truth contained therein.

In Modern Woomen of Americanvs. Davis, 184 Ill.

236, suit was brought on a benefit certificate and the coroner's verdict, corner's report of evidence, together with other evidence, were offered as a part of the proof of death and in its opinion the court said, "Any statement contained in the notice and proofs of death was available to the order as evidence in the nature of admission made by the plaintiff in the action, \* \* \*\*

The proof of death were admissible in evidence. Such proofs included the affidavit of John A. Hoffman, M.D. to the effect the immediate cause of death of the assured member was 'acute alcholism.' The court refused to permit the Order to introduce this affidavit as being part of the proofs of death, to the jury, but required the affidavit to be detached and admitted the remainder of the papers constituting the proofs. In so doing we think the court was in error."

Gill vs. Modern Woodmen of America, 221 Ill. App.

388, was a suit in assumpsit in which Abbie B. Gill sued the

Modern Woodmen of America upon a benefit certificate for \$2,000

issued to one Harry A. Gill, since demeased. The declaration

consisted of the common counts and two special counts. The

special counts are in substance the same and aver that the company
issued its policy to Harry A. Gill on August 19, 1909, for

\$2,000; that insured died July 1, 1918; that proof of death and

claim for benefit were furnished appellant and that appellees

were entitled to recover from appellant the face of the policy.

Appellant, the Modern Woodmen of America, pleaded the general issue and five special pleas. The first special pleas avered that the Modern Woodmen of America delivered to Gill its benefit certificate, which was accepted by him, and which certif-

It is the contention of the appellant that the parties to an insurance policy or certificate have a right to make any agreement they choose.

The proofs of death furnished by the appellant required the furnishing of these documents end the plaintiff adopted the same and vouched for the truth contained therein.

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383, was a suit in assumpait in which Absis b. Gill sued the
Woodmen of America upon a benefit certificate for \$2,000
issued to one Harry A. Gill, since decessed. The declaration
consisted of the corron counts and two special counts. The
special counts are in substance the same and ever that the company
issued its policy to Harry A. Gill on August 14, 1935, for
\$2,000; that insured died July 1, 1938; that proof of death on
claim for benefit were furnished appellent and that appelless
were entitled to recover from expellent the face of the policy.

Appellent, the Modern Woodmen of America, plonded the general issue and five special pleas. The first special glea svered that the Modern Woodmen of America delivered to fill its benefit certificate, which was accepted by him, and which certifi-

icate provided that if said insured should become intemperate in the use of drugs or narcotics said certificate would become void, and alleges that the insured did become intemperate in the use of drugs and narcotics. The second and third special pleas aver that the contract sued on provides that if said Gill's death resulted directly or indirectly from his intemperate use of drugs or narcotics the contract would be void.

The second plea charges his death occurred directly from the use of drugs and narcotics, and the third, that his death indirectly resulted therefrom. The fourth avers that Gill became and was intemperate in the use of intoxicating liquors and that under said contract it became void. The fifth special plea avers that Gill made application to appellee for said benefit certificate, which application was made a part of his contract, and that in said application the statements made by were warranted by him to be literally true; that said Gill in said application stated that he did not use any drug or narco tic or stimulant except tobacoo, and that he had never taken any treatment for the morphing, cocain or opium habit. It is however, avered in the plea that these statements were not true. 'A trial was had with a finding in favor of the beneficiary of the said Harry A. Gill in the sum of \$2,000. On the trial the proofs of death were offered, and the Court on page 395, said: "The court did not err in allowing the appellant to offer the proofs of loss so far as they pertained to the statement made by appelle e, Abbie B. Gill, or to the statement made by the physician."

Ferrero vs. Knights and Ladies of Security, 309

Ill. 476, was a suit brought by Minnie Ferrero, against the

Knights and Ladies of Security based upon a benefit certificate.

A trial was had and judgment rendered in favor of the plaintiff,

which was affirmed by the Appellate Court, and appeal was prosecuted
to the Supreme Court.

The declaration set forth the benefit certificate and avered compliance with its terms, provisions and conditions.

The defendant pleaded the general issue, especially setting forth two defendes; one defende was a provision of the law of the society

icate provided that if said insured should become intentual or in the use of drugs or narcotics said contificate would become for the vold, and alleges that the insured did become internance in the use of drugs and narcotics. The second and third special class aver that the contract sued on provides that if weld Cill's death resulted directly or indirectly from his interperate use of drugs or marcotics the contract would be roid.

The sound plan charges his death occurred directly from the use of drugs and narestics, and the third, that his death indirectly resulted therefrom. The forth avers that Gill become and was intemperate in the use of interioating lights and that under said contract it become void. The fifth special ples avers that Uill mede application to appellee for said benefit certificate, which application was asde a part of his contract, and that in said anylication the statements wase by All were warranted by him to be literally true; that build 3111 in said application stated that he did not use any drug or narectic or stimulant except tobacco, and that he had never taken may treatment for the morphing, escain or oriem habit. It is newestr, avered in the olea that these statements were not income that was had with a finding in dayor of the beneficiary of the said Herry A. Gill in the sum of \$1,000. In the trial the proofs of death were offered, and the Court on page 595, said: "The court To electe alt raile of the flood, and guitwolle ni tra ton bid loss so far as they norted ned to the sistement ande of appellar . Abbie B. Gill, or to the statement rode by the physician.

Werpero vs. Emilyte and Laides of countly, 209

111. 473, massa suit brought by the terment, the country and Ladies of Security based upon a benefit centification.

A trial was had and judgment readered in favor of a Country which was affirmed by the Appellate Court, and and a court.

to the Sugreme Court.

The declaration cot forth the feath's durit land avered compliance with its terms, reprisions no radius. The defendant pleaded the featurel is we, at related the feature two defendes; one defende was a provision of the land of the constant provision of the land of the l

that in case any one holding a certificate, should attempt to attempt to commit suicide, either same or insame, the certificate should become null and void, and that the assured on the 3rd day of April, 1921, attempted to commit suicide. The other defense was based on a provision that in case any member should die by his own hand, whether same or insame, the full liability of the Society should be the amount actually paid by the member into the benefit fund, and it was charged that the assured died as the result of a wound inflicted upon himself with suididal intent, that the amount paid to the benefit fund was \$31.10, which had been tendered to the plaintiff and refused. The plaintiff joined issue on the pleas and/hearing was had which resulted in a verdict for the plaintiff for \$952.00, on which judgment was rendered. On the trial of the case the statements in the proofs of death were admitted in evidence, and in its decision at mges 479 and 480 the court said: "The cause of death given in the proofs of death and coroner's verdict was aspiration pneumonia, and in the proofs of death submitted by the plaintiff there was . also a statement of the coroner in answer to a question; the question was "Did the deceased commit suicide?" and the answer was "From evidence submitted, wound in the neck made with razor by himself with suicidal intent before being admitted to Anna State Hospital. When Ferrero cut his throat his act might be at the time recognized as an attempt to commit suicide because death was not immediate, but his death was by suicide, the proof that he died by his own hand was conclusive, and there was no evidence tending to prove the contrary."

The defendant had the burden of establishing the fact of suicide, notwithstanding the statement in the proofs of death. (Knights of Maccabees v. Stensland, 206 Ill. 124; Knights of Templars and Masons Life Indemnity Co. v. Crayton, 209 id. 550) The statement in the proofs of death above quoted was admissible in evidence but not conclusive on either party. (Modern Woodmen v. Davis 184 Ill. 236; Kieswetter v. Knights of Maccabees 227 id. 48). The plaintiff did not offer any evidence inconsistent

that in case any one holding a certificate, should attempt to attempt-to counit suicide, either care or insers, all certificatu should become ault and void, and that the assured on the 3rd day of April, 1921, attempted to co mit suicide. The other defense was based on a provision that in case eny manher chanded to by his own hand, whother same or incane, the full liability of the Society should be the anount actually gain by the number into the benefit fund, and it was charged that the secret died as the result of a wound inflicted upon himself with smittant into t, that the emount pold to the bonefit fund was "di.lu. which had been tendered to the plaintiff and rotused. the plaintiff joined issue on the pleas and hearing was had which resulted in a verdict for the plaintiff for 1902.00, on which full ment has candered. In the trial of the case the statements as the proofs of death were admitted in evidence, and in its decreter at percus 479 and 480 the court tota: "The manne of derib three in it proofs of death and coreact's rendict was aspiration packaria, and in the proofs of depth evinettee by the pluintiff that dur also a statement of the coroner in thawer to a ...sticm: the question was 'Did the decreased sammit suinide" and this asmuch to co From evidence submitted, wound in the need and with rance by bimeshi wath saididel lates borome being admissed to matthiate Wospital. The history wis throat and sold in the order and the time recognized as an effect to come as it is a december dense was not inmediate, but big nearh was in those, but great these he died by his own hand has conclusion, no hard dear another tending to prove the a cirarr."

The defendent had the burden of established but the proofs of the factor of salelie, nothing the formal and the proofs with the above the first of the proofs of death above the first of the first of the proofs of death above the first of t

with the statement made, and there was no conflict in the evidence which established the fact of suicide."

In view of the rule as above announced the court in the instant case, erred in refusing to admit the proofs of the death. The judgment of the circuit court of Knox County is reversed and the cause remanded.

Reversed and Remanded.

with the statement made, and there was no conflict in the cykish or which established the fact of suioide."

In view of the rule as above announced the court in the instant case, cried in rerusing to admit the proofs of the death. The jungment of the circuit court of Knex County is reversed and the cause remanded.

Reversed and demanded.

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STATE OF ILLINOIS,	85.
SECOND DISTRICT	I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District o	f the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the fore	going is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my	
·	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty-
	Clerk of the Appellate Court
(53761—3M—7-27)	Cierk of the Appendic Court



AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 642<sup>1</sup>

BE IT REMEMBERED, that afterwards, to-wit: On JAN 25 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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8078 Agenda 36

Crawford State Savings Bank a corporation,

Plaintiff in error,

VS.

Error to the Circuit Court of Kane County.

Royal Indemnity Company, a corporation,

Defendant in error,

May Term, 1929.

Jett, J,

This is a suit in assumpsit, instituted by the Crawford State Savings Bank, a corporation, plaintiff in error, hereinafter referred to as plaintiff, against the Royal Indemnity Company, a corporation, defendant in error, hereinafter referred to as defendant, upon a policy of insurance by which the defendant undertook to indemnify the plaintiff against loss through dishonest acts of the employees of the plaintiff.

The declaration alleges that the defendant, on July 22, 1923, issued its \$50,000 banker's blanket bond, indemnifying the plaintiff against loss from embezzlement by any of its employees. The bond in question continued in force from July 23, 1923, until July 22, 1925, when it was superseded by another bond; that on May 26, 1926, it was discovered that an employee of the plaintiff during the term of the bond, had embezzled \$8600.00; that notice of this loss, with itemized proof of loss had been given to the defendant, but that it refused to pay.

To the declaration the defendant pleaded the general issue; a jury trial was had, with a finding in favor of the defendant and the plaintiff prosecutes this writ of error. It is insisted by plaintiff that the verdict of the jury is against the manifest weight of the evidence.

Crawford State Savings Bank a corporation,

. Plaintiff in error,

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Royal Indemnity Company, a corporation,

Derendant in error,

Error to the fireuit Jourt of Leme County.

Ma,y Term, 1929.

Jett, J,

This is a suit in assumpsit, instituted by the rawford Stets Savings Benk, a corporation, plaintiff in error, hereinafter referred to as plaintiff, against the Koyal Indeamity Tompan, a corporation, defendant in error, hereinafter referred to as defendant, upon a policy of insurance by which the defendant undertook to indemnify the plaintiff against loss through dishonest acts of the employees of the plaintiff.

The declaration alleges that the defendant, on July 28, 1981, issued its \$50,000 banker's blanket bond, indemnifying the plaintiff against loss from embezzlement by any of its ample, see. The bond in question continued in force from July 23, 1183, until Jul, 28, 1925, when it was superseded by another bond; that on ing 75, 1925, it was discovered that an employee of whe plain iff surfaces that an employee of whe plain iff surfaces that the bond, had embedaled \$8500.00; she the ice of this loss, with itemized proof of loss had been street to the contrast both that it refused so pay.

To the declaration the defendant placed the manned in our a jury trial was had, with a funding in through a few and the plaintiff prosecuted this withoff or or or it is to by plaintiff that the vertical of the jury is well to the evidence.

The bond of the defendant was in force during the time of the employment of one Arthur R. Giannotti, the defaulting employee. Giannotti was a witness for plaintiff, and in his deposition among other things, testified that he was short \$7900.00 on May 16, 1925, and stated in detail how he took the money from time to time.

The record discloses that by an examination conducted by the Illinois State Auditor, Giannotti was a defaulter to the extent of \$11,000 or more.

It is quite evidence from the evidence that Giannotti was a defaulter during the term that the bond in question was in effect, and, conceding that there might be some difference of opinion as to the amount of the loss on July 22, 1925, the record discloses the fact that the shortage on said date was \$7900.00.

In view of the state of the record it is not necessary to discuss what is further shown by the evidence for the reason that we are of the opinion that the only question involved is the amount of the shortage.

It is insisted by the defendant that since the jury passed upon the question of fact and found for the defendant, the judgment of the lower court should be sustained.

Owing to the facts as shown herein we cannot follow the suggestion of the defendant. The judgment of the Circuit Court of Kane County will be reversed and the cause remanded.

Reversed and Remanded.

The bond of the defendant was in force during the time of the employment of one Arthur r. Ciannotti, the defaulting amployee. Ciannotti was a witness for plaintiff, and in his deposition among other things, testified that he was snort \$7900.00 on May lo, 1925, and stated in detail how he took the money from time to time.

The record discloses that by an examination conducted by the Illinois State Auditor, Giannotti was a defaulter to the extent of \$11,000 or more.

It is quite evidence from the evidence that Giannotti ms a defaulter during the term that the bond in question was in effect, and, conceding that there might he some difference of opinion as to the amount of the loss on July 22, 1925, the resort discuss the fact that the shortege on soil date was 7900.00.

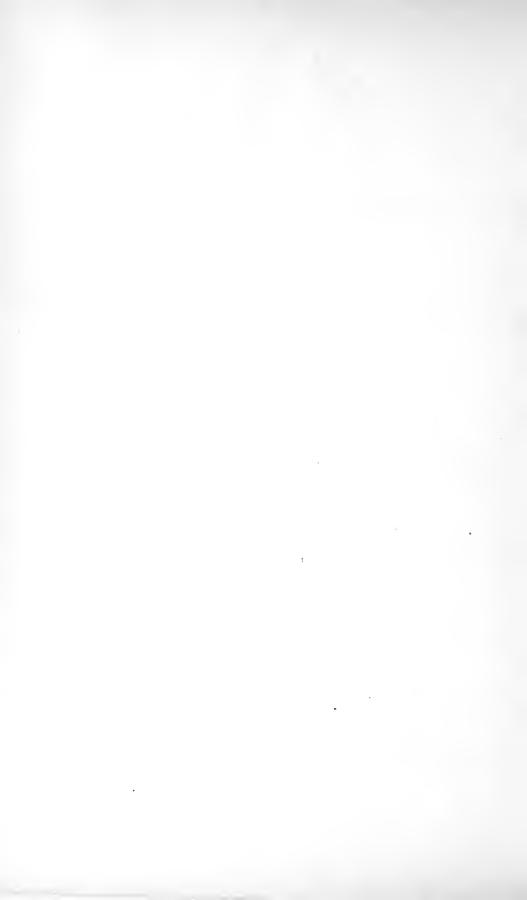
In view of the state of the record it is not necessary to discuss what is further shown by the evidence for the reason that we are of the opinion that the only question involved is the amount of the shortage.

It is insisted by the defendent that since the jury passed upor the question of fact and found for the defendant, the judgment of the lower sourt should be sustained.

Owing to the fasts as shown herein 'e sannot follor the suggestion of the defendant. The judgm 't if the direct flourt of Kane County will be reversed and the cause necessite.

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STATE OF ILLINOIS, SECOND DISTRICT	ss. I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
and for said Second District	of the State of Illinois, and the keeper of the Records and Seal thereof,
	regoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in n	
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty-
	Clerk of the Appellate Court
(53761—3M—7-27)	



12)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

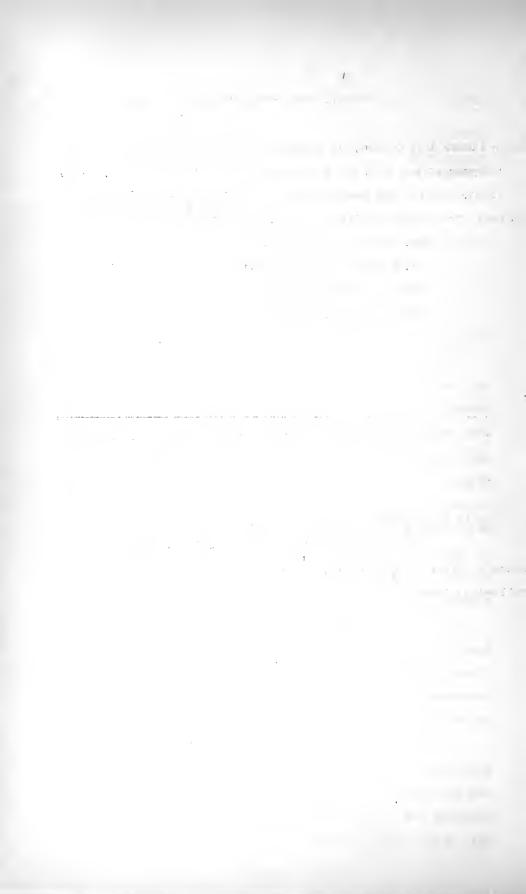
Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 6422

BE IT REMEMBERED, that afterwards, to-wit: On JAN 25 1956 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



8084

Agenda 51.

Board of Trustees John Stuart Ryburn Memorial Hospital of Ottawa, La Salle County, Illinois,

appellees,

appellant,

VS.

Bree S. Kelly,

Appeal from the Circuit Court of La Salle County.

May Term, 1929.

Jett, J.

Board of Trustees of John Stuart Ryburn Memorial Hospital of Ottawa, La Salle County, Illinois, filed its bill in the Circuit Court of La Salle County, summons returnable to the June Term, 1929, against Bree S. Kelly, appellant, alleging that appellees as trustees of John Stuart Ryburn Memorial Hospital, had discharged Bree S. Kelly, appellant, as a superintendent of said institution for mis-management and insubordination; after that after her discharge the appellant had refused to vacate said hospital premises, and the room or rooms occupied by her as a dwelling place, and to surrender the keys and records thereof.

The prayer of the bill is to the effect that Bree S. Kelly, appellant be perpetually enjoined and restrained from remaining in or entering the said hospital, except as a patient, or from interfering in any manner with any of the managers, employees or patients therein.

Appellant filed an answer to the bill and upon replication being filed thereto, and after hearing thereon, the court, on the 25th day of March, 1929, entered an interlocutory decree, granting the relief prayed for in said bill of complaint, and this appeal was prosecuted by appellant.

Appeal from the "irenil fourt

of Ta Islie for mow.

Board of Trustees John Stuart Ryburn Memorial Hospital of Ottame, La Falle County, Illinois,

appellees,

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Bree S. Keily.

appellant,

Mry Rera, 1922.

Jett, J.

Board of Enustees of John Stnart "ybern Mamoris of Ottawa, he Salls Jounty, fillingis, filled its hill in the Sirouit Jount of La Salle Jounty, summers returnable to the June Term, 1929, against Erre J. Kealy, appallent, alleging that appellees as trustees of John Stuart Rymur Memorial fispital, hed discharged Bree S. Kelly, appellent, as a superfactintendent of said institution for mis-management and inschordination; after that efter her discharge the appellant and instruct to vacate said hospital premises, and the room or rooms occurred to her as a awelling place, and to surrender the Peps and respective thereof.

The proyer of the bill is to the effect the line of Priy, appellant be perpotually enjoined and the residence in or entering the said loogistel, except the patients, or troat interfering in any memor with any of the letteries therein.

A pellant filed an answer to the 'ill ast ion self. Stion being filed thereto, and efter hearing thereto, the sole, on the 25th day of larch, 1973, entered at lossic uton as marking the relief payal for in sail blue lossil in.

The record discloses that Bree S. Kelly was first employed as superintendent of said hospital on the 15th of June, 1925, and continued to act as superintendent under yearly contracts, from that time until the decree was entered in this cause. There appears to be some question as to whether her contract for the current year expired May 2nd, 1929, or May 31st 1929, but no contention is made by appellees that her yearly contract had expired at the time of her alleged discharge, or at the time of the filing of the bill or entering of the decree in this proceeding. In her answer appellant denies that she was legally discharged; that she withheld the keys and records of the institution, or that there was any disorder or confusion in the hospital on account of her intermeddling.

Appellant does not deny the right of appellee to discharge her prior to the expiration of her contract, for a sufficient reason or for any an insufficient reason, but insists that said hospital belongs to the city of Ottawa, and that the bill should have been filed, if otherwise proper, by the city instead of by the said Board of Trustees. In support of this contention our attention has been sailed to the case of Johnston v. City of Chicago, 258 Ill. 494-497. We have examined this case and do not think it is decisive of the question as contended by appellant; there is nothing in the opinion in said cause, as we view it, that would authorize us to hold that appellees were not the proper ones to institute this proceeding. It will be remembered that the title to the property is not involved in this cause.

It is in effect admitted by appellant that the Board of Trustees of said hospital have the power and authority to discharge her. It would seem to follow that if they had such power, and if appellant was interfering with the management of the institution, or with her successor, appointed by the Trustees, the Board of Trustees would have the right to apply to a court of equity to enjoin appellant from so interfering.

The record discloses that Bree S. Melly was first deployed as superintendent of said hospital on the 15th of June, 1925, and continued to set as superintendent under yearly contrasts, from that time until the decree was entered in this cause. There appears to be some question as to whother her contrast for the curront year expired May 2nd, 1929, or May 31st 1929, but no contention is made by appelless that her yearly contract had expired at the time of her alleved discharge, or at the time of the filty of the bill or entering of the decree in this proceeding. In her answer appellent denies that she was logally discheased; that she withheld the keys and records of the hospital on that there was any disorder or confusion in the hospital on account of her intermedaling.

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It was the duty of the members of the Board of Trustees of the hospital to manage it, and whatever personal interest, appellant or appellees might have or inject in this proceeding, is subservient to, and of no consequence, considering the rights of the public, that the hospital might be properly maintained and conducted, so as to render the best service possible. The Board of Trustees of the hospital had the power to adopt by-laws and rules of regulation, which are reasonable and consistent with the general purposes of the hospital.

Cahill's R.S. 1927, Chap. 24, Sec. 576m provides: "The directors shall, immediately after their appointment meet to organize by the election of one of their number president and one as secretary and by the election of such officers as they may deem necessary. They shall make and adopt such by-laws, rules. and regulations for their own guidance and for the government of the hospital as may be expedient, and not inconsistent with acts and ordinances of said city. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the "Hospital Fund", and of the supervision, care and custody of the grounds, leases and buildings, constructed, leased or set apart for that purpose, and all moneys received for such hospital shall be deposited in the treasury of said city to the credit of the "Hospital Fund" and drawn upon by the proper officers of said city upon the proper authenticated vouchers of said hospital board. Said board shall have the power to purchase or lease ground, to occupy, lease or erect appropriate building or buildings, for the use of said hospital; said board shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees, and shall in general carry out the spirit and intent of this act in establishing and maintaining a public hospital, and one or all of said directors shall visit and examine said hospital at least twice each month and make monthly reports of its condition to the city council."

It was the duty of the members of the Coard of Progress, Thellary the hospital to manage it, and who keyer personal interest, Thellary or appelless might have or inject in this proceeding, is subsertiont to, and of no consequence, sensitioning the rights of the public, that the nespital night be properly meinteined and conducted, so as to reader the best service possible. The Send of Trustees of the hospital had the power to adopt by-laws and rules or requiretion, which are reasonable and consistent with the general purposes of the hospital.

Cahill's R.S. 1927, Chap. 34, Sec. 5754 proviles: "The directors chall, immediately after their appointment meet to organize by the election of one of their number president and one as secretary and by the election of tush officers as they may deem necessary. They shall and s adopt queb by-laws, rulas, and regulations for their own guidence and for the government of the hospital as may be extent, and not inconsistent with acts and ordinances of said ofig. They shall have the exclusive there end to be expended to a sil manera collected to the control of the "Hospitsh Tund", and of the supervision, ours and castoly of the grounds, leases and buildings, constantied, leases apart for that pargoss, and all woners restived for such hospital shell be deposited in the treasury of this other or the credit of the "Hospital Fund" and drawn apon by the proper officers of said city upon the proper authemilies ed vouchers of said bospital board. Said bored shall larre the cover to garchout to Lecto ground, to overpy, laise or erest appropriate brillian or build bras, for the use of said hospital; wild hered all have sever in appoint a suitable surerinteriest or unitry, or hold, and near seary assistants and fix that the perception, sat thell also are polor to remove such appointers, and while the grapher with the spirit and intent of this set in orbidishing of house thing a public hospital, and ore or 'll of said circu tro a' ll " -it and examine said hospitel of least two over monain and well monthly reports of its condition to the city council." There was placed upon the members of the Board of Trustees the duty to manage, and they were authorized to appoint a super-intendent or matron. The trustees were the sole judges of the qualifications of such appointee, and of the conduct of such appointee and could remove her at any time, for any cause or for no cause, of course being liable in damages, if any, for breach, if any, of the contract.

We are of the opinion therefore that since such power was lodged with the trustees they were the proper persons, if, in their judgment an appointee was not doing the things which were for the best interest of the institution, to relieve her from further duties as such appointee.

It is also contended by the appellant that the appellees did not offer to do equity in the bill; that is that they did not tender appellant whatever amount might be owing to her as such superintendent of the hospital. In so far as the decree has the effect of barring appellant from any action for damages she might have for being discharged before the termination of her contract, it is too broad, and should be so modified as not to interfere with her right in this connection.

There was some evidence tending to show that appellant had offered to resign upon being paid a certain sum. Before such resignation had been accepted however, she withdrew the same, and we are of the opinion that having withdrawn her resignation before it was accepted, her claim for damages, if any, for being discharged would not be affected by such offer to resign.

We are of the opinion that the decree should be modified so as to protect the rights and interests of appellant in the event she seeks to recover damages for being discharged before the termination of her contract of employment. The decree will be so midified and affirmed.

The cause is reversed and remanded with directions to modify the decree as herein indicated.

Reversed and remanded with directions.

There was placed upon the members of the Beent of Theters the duty to mange, and they sere authorized to appoint a super-intendent or nation. The trustees were the sole indicate of the qualifications of such appointee, and of the contest of such appointee and could remove her at any time, for any cause or for no cause, of course being liable in decrease, if any, for breach, if any, of the contract.

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The capae is reversed and remarked that leading to 10' F

Reversed and reversed with the entire.

STATE OF ILLINOIS,	gg .
SECOND DISTRICT	I, JUSTUS I JOHNSON, Clerk of the Appellate Court, in
and for said Second Distric	et of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the f	oregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in	my office.
	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty
(53761—3M—7-27)	Clerk of the Appellate Court



Jan 24-1929

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Jan 10-1930

255 I.A. 6 3

General No. 8261

Agenda No. 46

Ora Gridley, Appellee.

vs

John H. Wood, et al.

American State Bank, Corn Belt Bank, Paul F. Beich and Herbert Livingston, Appellants

Appeal from McLean

NIEHAUS, PJ.

Ora Gridley the appellee filed a bill of complaint in the circuit court of McLean county against John H. Wood and others for the enforcement of a lien against real estate for unpaid alimony due her. The bill contains the following allegations:

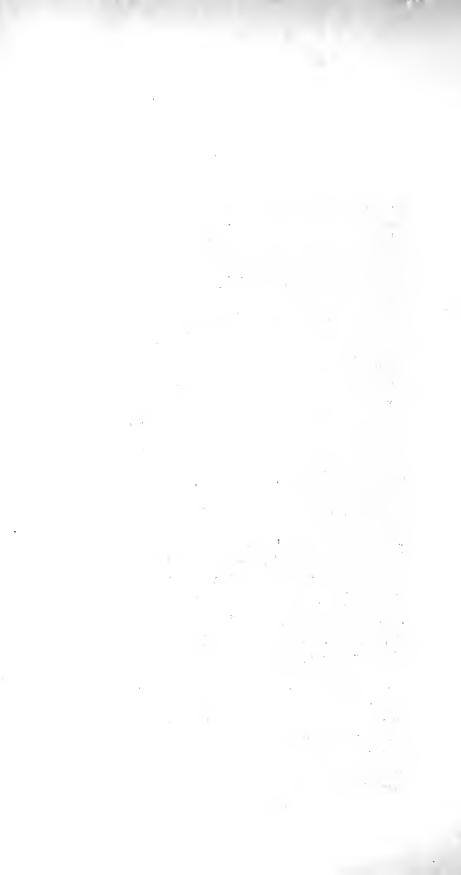
Prior to the 18th of October, 1902, she was the wife of Edward B. Gridley. That on the 18th of October, 1902, oratrix field for divorce in the Circuit court of McLean County, in chancery cause No. 8352. A decree of divorce and alimony in favor of oratrix was rendered, which decree was afterwards anneaded and is still in full force and effect. Said decree provided for alimony but not in lieu of dower of \$1,800 per year from the first of September, 1902, payable quarterly. That said decree further ordered and adjudged that the alimony to be paid to your oratrix should, in case of the death of Gridley, be binding upon his heirs, exceutors and administrators until complainant's dower should be assigned to her in the estate of Edward B. Gridley owned and possessed by him at the date of the filing of the bill, unless otherwise ordered by the Court; provided, however, in ease of death of Edward B. Gridley, alimony should thereafter be at the rate of \$900.00 per year until the dower in the estate of Edward B. Gridley should have been assigned. That said Edward B. Gridley died January 7, 1914, having paid to your oratrix all alimony that accrued to her to said date, and that said quarterly payments, until further order of the Court, were made a lien upon said real estate until Edward B. Gridley should execute a good and sufficient morificage upon sufficient real estate, to be judged sufficient by the Court, or until he should give to your oratrix a good and sufficient boul for the payment of the alimony in said sum, and



with sureties to be acceptable to your gratrix or approved by the Court, copy of which original decree is attached and marked "Exhibit A." That said Edward B. Gridley never did execute any mortgage or bond. That prior to the death of Edward B. Gridley, in the month of May, 1903, he filed his petition in this Court asking the Court to modify the decree for divorce and alimony by transferring the lien, and also your oratrix' inchoate right of dower, from certain real estate described in the decree to other real estate. That said Edward B. Gridley, with his petition, filed a written stipulation or contract agreeing to transfer a written supmation or contract agreeing to transfer the lien for the payment of said installments and for the transfer of oratrix' inchoate right of dower from certain property described in the original decree, a copy of which petition and stipulation is hereto at-tached and marked "Exhibit B." May 2, 1903, pur-suant to petition and stipulation, this Court entered a decree ordering the transfer of said lien and the inchoate right of dower, as prayed for, a copy of which decree is hereto attached and marked "Exhibit C." That prior to his death, in the month of October 1909, said Edward B. Gridlev filed his petition in said cause for further modification of the original decree for divorce and alimony, and the said supplemental decree, so as to provide that he might encumber certain real estate upon which lien for your oratrix' payment of alimony rested, to other real estate, and also trans-fer to the other real estate your oratrix' incloate right of dower in said real estate. That Edward B. Gridley filed with his last mentioned petition, a written agreement bearing date October 18, 1909, that said lien and her inchoate right of dower might be transferred and attached to other real estate which he then owned. That he then owned the entire title and fee simple to Lots 13 and 14 in Subdivision of Lots 50 to 54, inclusive in the Original Town of Bloomington, Melsoan clusive in the Original Town of Bloomington, McLean County, Illinois, which property was subject to the lien of your oratrix for alimony and subject to her inchoate right of dower. Reserving an estate for his own, the said Edward B. Gridlev conveyed to one John H. Wood. That said John H. Wood then and there, on October 18, 1909, amended to said contract a stipulation of said Edward B. Gridley, as follows: "I, the said John H. Wood, the holder of the legal title of all the real estate described herein consent such ittle of all the real estate described herein, consent and agree to the above. In witness whereof I have hereunto set my hand and seal, the 18th day of October, 1909. John H. Wood. Seal." Pursuant to said petition of Edward B. Gridley and his stipulation and the consent of John H. Wood, this Court modified the the consent of John H. Wood, this Court modified the original and supplemental decree by decreeing and ordering said original and supplemental decree to be modified so that your oratrix' lien for alimony upon the undivided half of the East Half of the Southeast Quarter, and the Southeast Quarter of the Northeast Quarter of Section 27, Town 24 North, Range I East of 3rd P. M., McLean County, Illinois, he and the same was transferred to said Lots 13 and 14 of the Subdivision of Lots 50 to 54, inclusive, in the Original Town of Bloomington; further ordering and decree-Town of Bloomington; further ordering and decreeing that the inchoate right of dower in the first described real estate, to the amount of \$12,000, be transferred to said Lots 13 and 14, so that in case of the death of Edward B. Gridley, leaving your orative surviving him she, in addition to her dower in said mentioned real esate, should have additional dower interest therein to the amount of \$4,000, provided,

however, that if the said Edward B. Gridley should pay off and discharge the proposed encumbrance, complainant's right of dower in the land encumbered should be restored and not transferred as herem prowided. It was further ordered by said supplementandeerce filed October 22, 1909, that said contract of Edward B. Gridley, filed with last mentioned petition, bind him and the said John H. Wood, their herrs, administrators are said John H. Wood, their herrs, bind film and the said John II. Wood, their neits, administrators and executors, to the full extent therein said decree provided, a copy of which last mentioned petition and decree is hereto attached and marked "Exhibit D." Said Edward B. Gridley, by his last will, appointed John H. Wood, executor, and that he qualified and acted as such. And the said John H. Wood was made the sole legatee under said will. That Lohn H. Wood was made the sole legatee under said will. That John H. Wood paid your oratrix alimony at the rate of \$900 per year from and after Edward B. Gridley's death up to the quarter beginning April 1, 1916, and that in certain partition proceedings in this Court, entitled "Mary Gridley Bell by her conservator v. John H. Wood," No. 11650, and cause entitled "Logan A. Gridley by John H. Wood," No. 11651, the cash value of her dower in all lands of said Edward B. Gridley, extend of the conservator v. 2011. cept said Lots 13 and 14, and all alimony to which sho was entitled under the decree for divorce, and for alimony at the rate of \$900 per year after the death of Edward B. Gridley, was paid to her up to January 1, 1918, out of the proceeds of the sale of said partidower only in said Lots 13 and 14, and that her lien for alimony due her for the period commencing January 1, 1918, with lawful interest en the several installments after they became due under the said decree, and until her dower in said lots shall have been as-That said John H. Wood has paid your oratrix no alimony for the period commencing January 1, 1918, down to the date of the filing of this bill, and there is now due her five years' alimony at the rate of \$900 per year up to the first day of January, 1923, amount ing to \$4,500, and that he has paid her none of the rents or profits accruing to him from said Lets 13 and 14 which are improved, and are known as 108-110 East Front Street. That he has never assigned to your ora-trix her dower therein, either in gross or in common, or in any other manner whatever, although your oratrix' petition is on file in this Court praying for the assignment of said dower.

The appellants made a motion to dismiss the bill of complainant on the ground that it showed laches and wilful neglect on the part of the appellec to have a dower assigned in the premises subject to the lien; also laches in not enforcing her claim for alimony during the life time of John H. Wood; also on the ground that the court had no jurisdiction to



enforce the alimony decree. The court denied the motion and thereupon the appellants filed their answer to the bill, which contains five paragraphs. The appellee filed a replication to the answer and the case was thereupon referred to the Master in Chancery. The Master in Chancery reported the evidence taken, and found that the equities in the case were with the complainant; and that she was entitled to a decree to enforce her lien against the premises in question, for the alimony remaining unpaid. Objections were filed to the Master's findings; and under the order of the court the objections were allowed to stand as exceptions. Upon the hearing of the case, the court overruled the exceptions, and rendered its decree. The decree finds the amount of the arrears of alimony for the period from Jan. 1, 1918, including the payment due September 30, 1925, with interest, to be \$9131.75; and thereupon ordered that the appellee should be paid that amount within five days, together with lawful interest from the date of the decree; and that upon failure to pay the same, the real estate involved, be sold for cash to the highest bidder. The sale to be subject however to the installments of alimony accrued and to accrue to the appellee in the decree in cause No. 8352, from and including the first of October, 1925. until said decree for alimony in cause No. 8352 be satisfied in full; also subject

 to the dower rights of the appellee. The deerce further provides, that the lien upon the premises as provided for by the divorce decree in Gridley v. Gridley, Chancery No. 8352, is preserved and shall not in any wise be impaired by the decree of sale in this cause. And the decree also provides, that if no redemption is made, the Master issue a deed to the purchaser, subject to lien rights of appellee in reference to installments of alimony accrued and to accrue to the appellee under the decree of alimony after October 1st, 1925; and subject to her dower right in said premises. This appeal is from the decree.

Appellants defense to the appellee's claim of lieu and the right to enforce the same is set forth in the five paragraphs of their answer. And we will therefore consider the questions raised by paragraphs referred to.

It is averred in the first paragraph, 'that they were creditors of Wood, and that their claims had been allowed against the estate of John Wood to the amount of \$15000.00; that the estate of John Wood is insolvent, and that the premises described in the bill were sold under foreclosure proceedings. That the widow of John H. Wood and his estate were unable to redeem said property; and that for the purpose of saving themselves loss of money due to them from said estate, they purchased

the certificate of purchase for \$14241.31, being the amount due thereon; and that the title was taken in the name of Herbert M. Livingston for convenience. That the appellants voluntarily agreed among themselves to sell said real estate, as soon as the same could be advantageously sold, and that out of the proceeds realized, each was to be repaid the amount of money advanced for the purchase of said certificate of purchase and the outlay, insurance, taxes, and other expenses, and the payment in full of the indebtedness due them from John H. Wood; and that the surplus should be paid to Carrie E. Wood as executrix and widow of John H. Wood in proper proportion. That this agreement was voluntary on their part, and that the appellants intend not to profit by the purchase of said real estate over and above the repayment of the moneys due them; and that they intend to carry out said plan voluntarily undertaken.'

Concerning the matters set up in the first paragraph of appellants' answer, it may be said that it does not constitute any defense to appellee's claim of lien, nor to her right to enforce the same, because the proofs show, that lien provided for in the alimony decree as well as the decree itself, was in full force and effect at, and during, the time of the occurrences and transactions referred to in this paragraph which involved the

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rights of the creditors in and to the real property of John H. Wood which was subject to the lien in question; and that the lien had become legally effective upon this property in the life time of John H. Wood; that Wood had become a party to the alimony decree and to the placing of the lien upon the premises as holder of the legal title; and had expressly consented and agreed to the transfer of the lien from other real property of Edward B. Gridley to the premises in question. The validity and binding force of the lien as well as the right to enforce the same against the premises had become and were res adjudicata before and at the time of the death of John H. Wood; and hence had the same legally binding effect upon his estate, as well as the rights and interests of all who claim title, or rights or interest under the Wood title; and that any lien involved in the foreclosure proceedings mentioned in the paragraph referred to was therefore necessarily subordinate and subsequent to the lien provided for in the alimony decree which is sought to be enforced in this proceeding. Gridley v. Wood 215 Ill. App. 473; Mary Gridley Bell v. Wood 215 id. 658; Wilson v. Smart 324 Ill. 280.

The second paragraph of the answer alleges, that the appellee is not entitled to enforce her lien to secure her unpaid alimony, because she was guilty of laches in not  $\tilde{\mathcal{J}}(t) = dt$ 

having pressed the suit which she commenced in the eircuit court of McLean county for the assignment of her dower in the premises involved, to a conclusion; that this dower suit had been referred to the Master in Chancery to take evidence; but that no proofs had been taken; and no other action for the purpose of effectuating the assignment of the dower had been taken in the suit; and no further proceedings were had except the dismissal of the defendants therefrom, which appellants claim amounted to a dismissal of the suit. These matters however do not constitute legal laches on the part of appellee; and do not bar her right to the lien in question. The Statute made it the duty of John H. Wood to assign appellee's dower in the premises in question. The provision of the Dower Act is, that "it is the duty of the heir at law or other person having the next estate of inheritance or free hold in any lands or estate of which any person is entitled to dower to law off and assign such dower as soon as practicable after the death of the husband or wife of such person," Chap. 41 Par. 18 Smith-Hurd Rev. Stat. Bonner v. Peterson 44 111, 253; Warner v. Warner 235 Ill. 448. Wood failed to perform his statutory duty to have appellee's dower in the premises assigned, which would have stopped the further accruing of alimony; but apparently preferred to continue the payment of the amounts



of accruing alimony to appellee for over two years after the death of Edward B. Gridley at the rate fixed by the decree, namely \$900.00 per year. This is clear ly set forth in Gridley v. Wood, supra. We conclude that the neglect of the duty on the part of Wood in not assigning appellee's dower is chargeable to all parties who claim under him.

The third paragraph of appellants' answer sets up in defense to appellee's claim, that that part of the decree in the divorce proceedings of Ora Guidley v. Edward B. Gridley upon which the claim for alimony is based after Edward B. Gridley's death, is illegal; and that the court had no jurisdiction to render said decree so far as the appellants were concerned, which is a mere conclusion of law; and that the decree is so uncertain and equivical that the same is of no binding force or effect upon the appellants, which is obviously not in accordance with the fact; and that the enforcement of the decree is against public policy; and that to enforce the decree would be inequitable and against 'all equitable proceedings;' being in the nature of a penalty; and that the statute gives full remedy for failure to assign dower. It is apparent that there is no question of public policy involved in the enforcement of the decree in question, and that pleaders' conclusions about the enforcement being inequitable and in the



nature of a penalty are not well taken. The third paragraph does not embody any matters which may be regarded as a defense to appellee's right to the relief prayed for.

The fourth paragraph of appellant's answer avers, that the appellee had received the present cash value of her dower interest in other tracts of land; and therefore her demand for the amount of alimony due should be properly apportioned; and only so much of said alimony be allowed against the appellants as the value of the property here in question would bear to the entire value of the real estate in which the appelled was entitled to dower. The amount received by the appellee for her dower in premises other than those in question did not reduce the amount of alimony due her under the alimony decree; and the dower money was not received by her on account of or in payment of alimony due her. Under the alimony decree the appellee was entitled, after the death of her former husband, to \$900.00 a year, until all of her dower in the different parts of the property subject to the lien for the unpaid alimony, had been assigned. Her dower in the premises in question having never been assigned to her, the alimony continued to accrue and to be a lien against the property in question. It is clear, that the matters set up in paragraph four referred to do not constitute any defense to appellee's claim for relief;

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and the court therefore properly sustained an exception to this paragraph of appellants answer.

The fifth paragraph of appellants' answer merely amounts to a general denial of the allegations of fact in appellee's bill of complaint and does not set up any affirmative matters of defense.

The record does not disclose any error in the rendition of the decree; and the decree is therefore affirmed.

Grunn filed Oct 13-1929

255 I.A. C : 3

General No. 8310

Agenda No. 4

#### APRIL TERM, A. D. 1929

J. N. Moore, Individually, and J. N. Moore and Sylvia V. Moore, co-partners, doing business as Moore Adjustment Company, Plaintiffs in Error.

vs.

Charles C. Claar, Defendant in Error.

Writ of Error to the Circuit Court of Vermilion County ELDREDGE, P. J.

Charles C. Claar, Defendant in error, filed his bill of complaint in the Circuit Court of Vermilion County for an accounting, making J. N. Moore, individually, and J. N. Moore and Sylvia V. Moore, co-partners doing a business as Moore Adjustment Company, defendants thereto. Personal service was had upon Sylvia V. Moore. The controversy arises over the service of the summons upon the defendant J. N. Moore. The original return of the sheriff on the summons is as follows: "I have duly served the within writ upon the within named J. N. Moore, individually, and also J. N. Moore and Sylvia V. Moore, doing business as the Moore Adjustment Company, by leaving a true copy thereof for J. N. Moore at his usual place of abode with Mrs. Sylvia V. Moore his wife a person of the age of ten years and upward, and a member of the family of the within named defendant J. N. Moore and at the same time making known to her contents thereof. This the.....

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day of ...... 192....." It contains neither date nor signature. The defendants to the bill filed a special appearance for the purpose of quashing the service on said summons for the reason that it was not served upon J. N. Moore, by leaving a copy thereof at his usual place of abode with some person of the family of the age of ten years and upward. In support of said motion numerous affidavits were filed to the effect that J. N. Moore and his wife Sylvia V. Moore resided at 829 North Griffen Street in the city of Danville and, on the day that the summons was delivered to Sylvia V. Moore, she was visiting a friend who resided at 908 Anchor Street in said city, and that the copy left with her for service upon J. N. Moore was not left with her at the usual place of abode of the said J. N. Moore. Thereupon the sheriff asked leave to amend the certificate of service which was granted and the summons was amended so as to read as follows: " I have duly served the within writ upon the within named J. N. Moore, individually, and also J. N. Moore and Sylvia V. Moore, doing business as the Moore Adjustment Company, by leaving a true copy thereof at the residence of Mrs. J. C. Delbridge at 908 Anchor Street, Danville, Illinois, with Mrs. Sylvia V. Moore, his wife, a person of the age of ten years and upward, and a member of the family of the within named defendant, J. N. Moore, and at the same time making known to her the contents thereof. This 21st

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day of September, 1928. C. B. Grimes, Sheriff, By R. Cunningham, Deputy." The defendants again filed a limited appearance and renewed their motion to quash the service of the summons which the court denied. The defendant Slyvia V. Moore filed a demurrer to the bill whereupon the complainant dismissed the bill as to her.

Plaintiff in error, J. N. Moore, neither entered a general appearance nor answered the bill but was defaulted and upon a hearing a decree was entered in favor of the complainant and against him.

A motion has been made in this court by defendant to strike all the affidavits, filed in support for the motion to quash the summons, from the records because they have not been preserved by a certificate of evidence. The transcript of the record does not contain any certificate of evidence. We held in the case of Lyons v. Lyons, 219 Ill. App. 620, as follows: "While it is true that in chancery cases motions made will be considered as part of the record, yet, when such motions require evidence to sustain them, such evidence must be preserved by certificates of evidence and filed in the case, for in no other way can it become a part of the record." The same rule is announced in the cases of Lange v. Heyer, 195 Ill. 420, and DuQuoin Water Works v. Parks, 207 Ill. 46. The affidavits filed in support

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of the motion to quash the original summons and return thereon and also filed in support of the motion to quash the amended return have no place in the record and are stricken therefrom. But this will not avail the defendant in error anything. The statute specifically directs that where service is made by copy, the sheriff shall leave such copy at the defendant's usual place of abode with some person of the family, of the age of ten years or upward, and informing such person of the contents thereof. In the case of Piggot v. Snell, 59 Ill. 106, the return of the service did not show that the copy was left at the place of abode of the defendant, and the court held as follows: "This return is defective in not stating that the copy was left at the usual place of abode of Susan J. Piggot." The decree in that case was reversed on the ground that the court had obtained no jurisdiction of the person of the defendant. The summons and the return thereon, however, are parts of the record as is also the motion to quash the return of the service. The amended return of service made by the sheriff shows all the facts proven by the stricken affidavits and shows conclusively that there was no legal service obtained on the plaint of in error, J. N. Moore. It is apparent from the record itself therefore, that the Circuit Court was without jurisdiction of the



plaintiff in error and that the decree entered is erroneous and must be reversed.

The decree of the Circuit Court is reversed and cause remanded.

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255 I.A. B. 3

General No. 8322

Agenda No. 10

### APRIL TERM, A. D. 1929

Oscar Nelson, Auditor of Public Accounts, Appellee
vs.

New Salem State Bank of New Salem, Illinois in Which Filed Claim of Griggsville National Bank of Griggsville, Illinois, Appellant,

Appeal from Circuit Court of Pike County.

## ELDREDGE, P. J.

This appeal is wrongly entitled; it should be "The Griggsville National Bank of Griggsville, Illinois, Appellant, vs. Farmer's State Bank of Pittsfield, Illinois, Receiver etc., Appellee." The New Salem State Bank of New Salem, Pike County, was closed by the Auditor of Public Accounts on June 7, 1926, as hopelessly insolvent, and the Farmer's State Bank of Pittsfield was appointed receiver. The Griggsville National Bank filed its claim with the receiver for the sum of \$14,900.61 on the theories of money had and received, money paid for the use of, money in possession of New Salem State Bank, property of the Griggsville National Bank, money equitably due from the New Salem State Bank to the Griggsville National Bank and also for credits furnished by the Griggsville National Bank to the New Salem State Bank. The Master in Chancery to whom the cause

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was referred found the claim to be without merit and on a hearing of the exceptions to the Master's report the Chancellor also disallowed the claim.

It appears from the arguments of counsel for the different parties that one A. E. Dunham was a stockholder and depositor in the New Salem State Bank; that about a year before said bank failed, Dunham established an account with the Griggsville National Bank, and thereupon many checks of large amounts drawn by him on the New Salem State Bank were mailed to the Griggsville National Bank and his account in the latter bank credited with the amounts named in the checks; a corresponding number of checks aggregating practically the same amounts, drawn by Dunham on the Griggsville National Bank were sent by the New Salem State Bank to its depository, State Savings Loan and Trust Company at Quincy, for the credit of the New Salem State Bank. The Griggsville National Bank claims that all of these checks were forgeries. When the New Salem State Bank failed, there had been eight of such checks mailed to the Griggsville National Bank and credited to said Dunham by the Griggsville National Bank, and sent by the latter to its corresponding bank at St. Louis, Mo., to be

eventually paid by the New Salem State Bank when the checks should reach it. The Griggsville National Bank claims to have credited these checks to Dunham's account. The question in controversy on the hearing before the Master apparently was the issue only as to whether these checks were forgeries. Neither on the hearing before the Master nor before the Chancellor were these checks produced. The evi-. dence shows that they all came into the possession of counsel for appellant who testified that he received them from the Griggsville National Bank, appellant, but that he could not produce them because he could not locate them. He further testified that if he did produce them they would incriminate his client, the Griggsville National Bank. Of what crime they the Griggsville National tended to incriminate Bank is not disclosed or in any manner ex-The attorney did not testify that he had made a thorough search for these checks, but stated that they were not where such things were usually kept in his office. In answer to a question of whether he would produce them if they came into his possession, he answered, "I can't say what my state of mind might be.' The basis of appellant's claim is that the checks in question were forged and it apparently takes the position that if it produces them they will tend to incriminate it

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of forgery. In other words, it is seeking to take advantage of its own wrong. Such a contention is an absurdity and the Master and the Chancellor were clearly right in disallowing this claim. The decree should also be affirmed for other reasons. The transcript of the record is not a transcript such as the rules of this court require. It is simply a copy of a number of the papers filed in the case together with a mass evidence all tied together and not even arranged in chronological order. The brief and argument of appellant is a very meager document, and not a single page of the record or abstract is referred to in support of any of the facts discussed, which is also a direct violation of the rules of this court.

The decree of the Circuit Court is affirmed.



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255 I.A. 614

General No. 8328

Agenda No. 14

APRIL TERM, A. D. 1929

Gilbert Ramsey, Appellee

vs.

The New York, Chicago and St. Louis Railroad Company, Appellant.

Appeal from Vermilion

NIEHAUS, J.

Gilbert Ramsey appellee brought this suit against the New York, Chicago and St. Louis Railroad Company appellant herein, in the circuit court of Vermilion county, to recover damages for injuries to his person and to his automobile, alleged to have been caused by the passenger train operated by the appellant, which collided with the appellee's automobile on August 21, 1926, on the grade crossing located at the northerly limits of the village of Ridge Farm and the Dixie Highway. There was a trial by jury; and at the close of appellee's evidence, the court directed a verdict in favor of the appellant as to four counts of the declaration alleging negligence of the appellant as the cause of the collision; and thereupon the case was submitted to the jury on the issues raised by the three remaining counts of the declaration, which are referred to as the first and second counts and the fifth additional count. These three remaining counts purport to charge, that the injury in question was wilfully

and wantonly inflicted upon the appellee by appellant's servants who were in charge of the passenger train in question. The jury returned a verdict finding the appellant guilty under the counts referred to, and assessed appellee's damages at \$7500. The appellant made a motion for a new trial which was denied by the court, and judgment was rendered on the verdict. This appeal is prosecuted from the judgment.

One of the errors assigned is, that the evidence does not sustain the finding of the jury by their verdict that the injuries which the appellec suffered, were wilfully and wantonly inflicted. Upon a careful review of the evidence in the record, we are unable to find sufficient proof of wilful or wanton conduct on the part of appellant's servants in the operation of the train which is alleged to have caused the collision. The verdict is therefore manifestly against the evidence on the vital issue in the case, and under the counts submitted to the jury.

Concerning the errors assigned on the instructions given for appellee, it may be pointed out, that instruction No. 2 is subject to the criticism made by the Supreme Court in Chicago City Ry. Co. v. Jordan 215 Ill. 390. The third instruction given for appellee, which recites the statutory duties of ringing a bell or blowing a whistle, is also erroneous when considered in connection with the other instruction concerning wilful and wanton conduct, in that a jury might



naturally conclude from the purport of the instruction that a neglect to comply with the statutory duties referred to would necessarily be wilful and wanton conduct in this case. Burns v. C & A R.R. Co. 229 Ill. App. 170; Enochs v. Trevvot 229 Ill. App. 235; O'Donnell v. Snyder 231 Ill. App. 581; Powell v. Kempton 231 Ill. App. 380; La Marre v. C.C. & St. L.217 Ill. App. 296; see also Brown v. Illinois Terminal Co. 319 Ill. 326. The 4th instruction contains an abstract proposition of law, which, though correct, was misleading in its effect in this case, because it assumes that the injuries in question resulted from a wilful and wanton act of appellant's servants, and that therefore contributory negligence was not a defense which the appellant could urge to prevent a recovery.

Concerning the Cross Errors assigned by the Appellee it must be pointed out that Court erred in directing a verdict for appellant on these counts which charged negligence. The issues joined on these counts should have submitted to the jury for detertermination from the evidence adduced on the trial.

For the reasons herein before stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

255 L.A. 614<sup>2</sup>

General No. 8321

Agenda No. 9

#### APRIL TERM, A. D. 1929

Winifred Behm, a Minor, by Charles Behm, Her Guardian and Next Friend, Appellant

City of Farmington, Illinois, a Municipal Corporation, Appellee.

Appeal from City Court of Canton, Fulton County. NIEHAUS, J.

Winifred Behm, a minor, by Charles Behm, her guardian and next friend, commenced this suit in the city court of Canton; being an action of trespass on the case, against the appellee city of Farmington, to recover injuries sustained by her being struck or kicked by a vicious horse which was upon one of the streets of the city of Farmington, and which, it is alleged, at the time of the injury was under the control charge and dominion of an employe of the city. The appellant's right of recovery is set forth in four counts of amended declaration, which was filed in the cause, and to which a general demurrer was sustained by the court. Appellant elected to stand by the amended declaration, and judgment upon the demurrer was entered by the court, from which this appeal is prosecuted.

The general demurrer raises the question whether any of the counts relied upon by the appellant for recovery for the injury sustained state a cause of action. And we shall consider

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these counts in their order with that question in mind.

The averment in the first amended count is that the city of Farmington did wrongfully and injuriously keep and use a certain horse which had a vicious temper which was well known to the city; that afterwards on the 30th day of September, 1927, this horse 'while hitched to a wagon and being used upon the city streets of the city of Farmington and under the control charge and dominion of an employe of the city did attack strike and kick the appellant.' There is no averment in this count of facts to show that while the horse in question was hitched to the wagon and used on the streets of the city under the dominion charge and control of the city's employe, the employe was engaged in the business or occupation of the city of Farmington; or was used upon the city streets in a transaction business or occupation of a character and kind that a city as a municipal corporation engaging therein, would become liable for any negligent acts of its employes under the doctrine of respondent superior. Johnson v. The City of Chicago 258 Ill. 494. The same objection applies also to the second count of the amended declaration.

The third count aims to state a violation of duty on the part of the city of Farmington, namely, that it was the city's duty to keep the street or highway in question in a safe state of repair and in good condition, and that the city disregarded its duty in that behalf on the day of the injury to the appellant, in that it wrongfully and negligently 'suffered and permitted at a regular intersection or crossing from the south to the north side of the street to be obstructed by a wagon and a team of horses under the control charge and supervision of an agent servant or employe of the city; and that one of said horses of the team attached to the wagon, being a horse of vicious temper well known to the city; by means whereof the appellant who was then and there passing along and upon said crossing and using said street and crossing with all due care and diligence, was attacked struck and kicked by the horse attached to the wagon obstructing said street.' Assuming that the appellant correctly stated the duty resting on the city, to keep its streets "in a safe state of repair and in good condition," and that it was a disregard of such duty to suffer or permit such streets to be obstructed by a wagon and team of horses at an intersection or crossing, it is clear, that the fact, that the appellant was attacked struck and kicked by a vicious horse constituting a part of such alleged obstruction was not a necessary or probable result of the alleged violation of duty, to keep the streets of the city in a safe condition of repair and in good condition; or the alleged negligence of the city in permitting the obstruction at the crossing by the wagon and team of horses.



The appellant's injury was not the proximate cause of the alleged violation of the duty referred to. The same objection pertains also to the fourth amended count. "The essential elements of actionable negligence are, first, a duty imposed by law to exercise care in fayor of the person for whose benefit the duty is imposed; second, the failure to perform that duty; and third, a consequent injury so connected with the failure to perform that duty that the failure is the proximate cause of the injury." Puterbaugh Pleading and Practice (9th Ed.) 780; Hartnett v. Boston Store of Chicago 265 Ill. 331. In Hartnett v. Boston Store of Chicago supra, the court in defining proximate cause said: "What constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission, and to be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence; although it is not essential that the person charged with negligence should have foreseen the precise injury that might result from his act. If the negligence does nothing more than furnish a conditiou by which the injury is made possible, and that condition cause an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury."

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For the reasons stated, we are of opinion, that none of the four amended counts of appellant's declaration state a cause of action against the city of Farmington; judgment is therefore affirmed.

Judgment affirmed.



JUL 26 1929

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STATE OF ILLINOIS

APPELLATE COURTS 5 I.A. 644

MAY TERM, A. D. 1929

TERM NO. 1.

AGENDA NO. 12.

FRANKLIN COUNTY BUILDING & LOAN

ASSOCIATION, a Corporation,
Defendant in Error,

ERROR TO THE CIRCUIT

VS. : COURT OF FRANKLIN COUNTY.

.. T. I. GALLOVAY:

Plaintiff in Error.

WOLFE, J.

This was a suit by the Franklin County,
Building and Loan Association, et als., filed in the Circuit
Court Franklin County to the May Term 1927. The pleadings
and facts in this case with the exception of the names of
some of the defendants are identical with the case of
Franklin County Building & Loan Association, a corporation,
vs. D. W. Blood, et als. T. I. Galloway and Jennic Galloway
filed in this court, May Term, A. D. 1929 case No. 29 Agenda
No. 23.

The assignments of error and the legal questions are identical in both suits and the ruling of the court and the reasons therefore in the former case are adopted by the court in this case. We find no reversible error in this case and the judgment of the Circuit Court of Franklin County is hereby Affirmed.

AFFIRMED.

Not to be reported in full.

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A. D. 1929

JUL 26 1929

CLERACO ATECOMET

TERM NO. 31.

SIDNEY BROWN, et al.,

Appellants,

VS.

FRANK KIENSTRA, et al.,

Appellees.

255 I.A. 6

APPEAL FROM THE CIRCUIT

COURT OF MADISON COUNTY.

WOLFE, J.

The appellees, Frank Kienstra, and Joseph Kienstra, are partners and are the plaintiffs in this suit which was before a Justice of the Peace in Madison County. Originally there were three defendants, but at the time of the trial before the Justice of the Peace the case was dismissed as to J. F. Wagner, The suit is based upon a promissory note. Trial was had before a Justice of the Peace and appealed to the Circuit Court of Madison County and tried in that Court. A verdict was rendered by the jury in favor of the plaintiffs for \$189.14.

After motion for a new trial was argued and denied, judgment was entered on the verdict for the plaintiffs for the sum of \$189.14.

The note in question on which the suit is based was signed by J. F. Burger, Ben Weber and appellant Sidney Brown, made payable to the Columbia Motor Sales Company for the sum of \$152.00, with the interest, etc., dated November 19, 1925, due eight months after date. On the back of the note was the endorsement, "Columbia Motor Sales Company per H. H. Clark, Manager.

Frank T. Kienstra, one of the Plaintiffs below, testified that he and his brother were in partnership and that the note had been properly assigned to them for a debt that was then

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Term No. 31.

owing from the Columbia Motor Sales Company to the plaintiffs, and that the note had not been paid. The note itself was introduced in evidence.

The defendant Sidney Brown testified that he received nothing for signing the note, and only signed it as surety for Joe Burger to purchase an automobile from the payee of the note. Defendant Brown also introduced seventeen receipts signed by the Columbia Motor Sales Company, claiming that the receipts represented payments made by one of the makers on the note. The only defense that Brown made was that the note had been paid.

In rebuttal the plaintiffs called H. H. Clark, a member of the Columbia Motor Sales Co., at the time of the making of the note, who testified that the receipts offered in evidence by the defendant were not part payments on the note, but were accepted by the Columbia Motor Sales Co., as payment on an open account that was owing the Company by the defendant Burger. This was the only evidence offered in the case. It is first contended by the appellants that the verdict is contrary to the evidence in the case. The jury had the advantage of seeing and hearing the witnesses testify, and they by their verdict have found the plaintiffs were entitled to recover, and unless the verdict is against the manifest weight of the evidence this Court will not disturb their verdict. From an examination of the evidence we cannot say that this verdict is against the weight of the evidence.

It is next contended that plaintiff's instruction No. 2 should not have been given as it directs a verdict and omits the defense of payment. No doubt in some cases it would be error to give this instruction, but in this case it is conceded by the appellants in their printed brief and arguments that the plaintiffs were holders of the note in due course and being such holders in due course, before the defense of payment would be available to the defendant it would be necessary for them to

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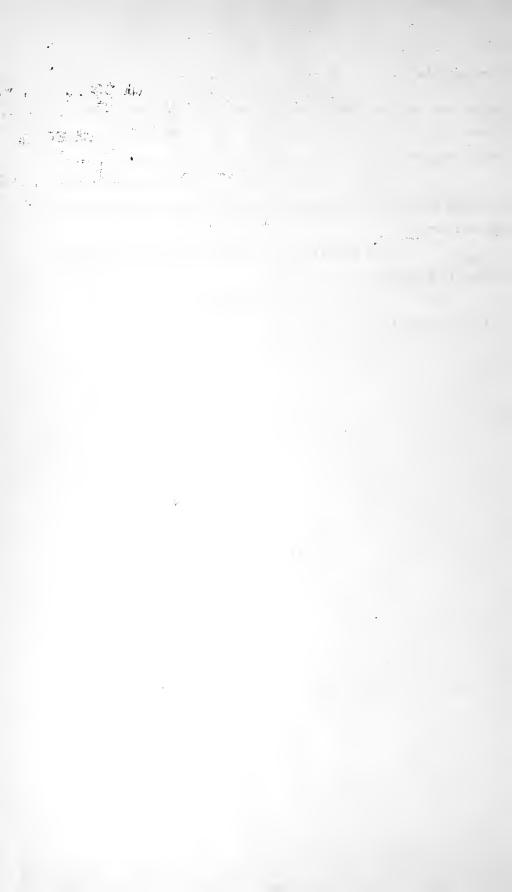
prove that they paid the holder of the note, but the evidence discloses that all of the payments were made to the Columbia Motor Sales Company and not to the legal holders of the note.

The are of the opinion that there is sufficient evidence to sustain the verdict and the giving of the instruction was not error.

The judgment of the Circuit Court of Madison County is hereby

AFFIRMED.

Not to be reported.



STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

SEP 20 1929

OCTOBER TERM, A. D. 1928.

TERM NO. 20

AG. NO. 40.

BERTHA WALSH,
Defendant in Error,

V.

E. E. MOORE, et al., Plaintiffs in Error. 255 I.A. 645

ERROR TO

EAST ST. LOUIS

CITY COURT.

Barry, P. J. - Bertha Walsh sued to recover for personal injuries charged to have been caused by general negligence in operating an automobile in which she was riding as an invited guest of plaintiffs in error; and by negligently driving the car knowing the brakes were in a defective and dangerous condition, by reason whereof the car was driven with great force against a tree near the highway, etc. In addition to the general issue a special plea was filed by E. E. Moore to the effect that at the time in question the car was not operated by him or by his agent or servant. There was a verdict and judgment for \$2,000.00.

Plaintiffs in error are husband and wife and live at Mattoon. They are friends of defendant in error and her husband who reside at East St. Louis. Mr. and Mrs. Richardson are mutual friends and their home is at Hillsboro. The Noores' owned an automobile, jointly, and about May 24, 1925, drove from their home to East St. Louis where they visited defendant in error and her husband for a week. On May 30 Mrs.

STATE OF ILLINOIS.

OCTOBER TERM, A. D. 1928.

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AG. MO. 40.

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TERM NO. 20

BERTHA WALSH, Defendant in Error,

-37

M. E. MOORE, et al., Plaintiffs in Error.

255 I.A. 645

ERROR TO

EAST ST. LOUIS

CITY COURT.

Barry, P. J. - Bertha Walsh sued to recover for personal injuries charged to have been caused by general negligence in
operating an automobile in which she was riding as an invited
guest of plaintiffs in errory and by negligently driving
the car knowing the brakes were in a defective and dongorous
condition, by reason whereof the ear was driven with great
force against a tree near the highway, etc. In addition to
the general issue a special plea was filed by R. K. Moore
to the effect that at the time in question the car was not
operated by him or by his agent or servant. There was a ver-

Plaintiffs in error are husband and wife and live at Mattoon. They are friends of defendant in error and her husband who reside at East St. Louis. Mr. and Mrs. Richardson are mutual friends on their howe is at Hillsbore. The Mocres! o med an automobile, jointly, and about may 24, 1928; drove from their howe to East St. Louis where they visited astendant in error and her masband for a week. On May 50 mrs.

Moore and others drove to Hillsboro and brought the Richardsons to the Walsh home in East St. Louis. The next day Mr. Moore asked defendant in error to go to Hillsboro with his wife to take the Richardsons home. She agreed to go and the parties left the Walsh home about 3 P.M. with Mrs. Moore driving the car.

Mrs. Moore says that when driving down a hill about two blocks out of Greenville the car started to leave the road when it was about 50 feet from a tree that stood in a little gully about eight or nine feet to the right of the beaten track. She says she tried to apply the brakes, but they did not work; that she had no chance to slacken her speed before the car hit the tree. There is no conflict in the evidence. Mrs. Moore admitted that two or three days before the accident she took the car to the White garage to see what was the matter with it; that Mr. White tested the brakes and told her they were in bad condition and should be adjusted and for her to come back at a certain time and he would fix them. They were not adjusted or repaired prior to the accident in question.

In view of the undisputed evidence there is no merit in the contention that Mrs. Walsh was injured as a result of a mere accident without negligence on the part of plaintiffs in error; nor did the court err in refusing to instruct the jury that if the injury occurred through mere accident without any fault of plaintiffs in error, she could not recover. It clearly appears that the injury was due to negligence in operating the car with defective brakes while defendant in error was in the exercise of due care for her own safety. The court did not err in refusing to direct a verdict and no reversible error having been pointed out the judgment is affirmed.

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AGENDA NO. 27.

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

May Term, A. D. 1929

255 I.A. 645

AMERICAN NATIONAL BANK OF WOUNT CARMEL, ILLINOIS,

Plaintiff in Error, )

Writ of Erroreto the Circuit Court of Wabash County.

78.

ROBERT WOOLARD and MARY M.

NOOLARD,

Defendants in Error.)

Hon. Roy E. Pearce, presiding Judge.

## OPINION BY WERHALL, J.

Plaintiff in error recovered a judgment by confession on a judgment note signed by defendants in error as makers for the principal sum of nine thousand dollars made in favor of First State Eank of Mount Carmel as payes and by endorsed to plaintiff in error.

On motion of defendants in error the judgment was pened and leave given them to plead to the declaration.

Fier to the trial it was stipulated between the parties that defendants in error should have the right to interpose any defences to said note that they might have interposed had eaid suit been brought in the name of the said State

Bank and that said defenses might be made under the plea of the general issue which was filed in said cause.

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Trial was had before a jury and a verdict rendered finding the issues for plaintiff in error and finding the amount of plaintiff's damages in the sum of four thousand dollars. Plaintiff in error made a motion at the close of all the evidence for a directed verdict in favor of plaintiff in error for the amount of the origimal judgment as confessed in the sum of ten thousand onehundred seventy two dollars and fifty cents, being the principal, interest and attorney's fees due plaintiff in error according to the tenure of said note as of the date of the entry of judgment by confession. The motion for a directed verdict was refused by the trial court and error is assigned on the court's ruling. After motion for a new trial by plaintiff in error was made and overruled by the court a judgment was entered confirming the original judgment to the extent of four thousand dollars, (being the amount of the jury's verdict), as of October 20th, 1924, the date of the entry of the original judgment by confession.

plaintiff in error contends that there is no competent evidence in the record tending to show that defendants in error had a legal defense to any portion of the indebtedness due on the note in question and that the trial court erred in not directing a verdict in favor of plaintiff in error for the full amount of the principal of the note, interest and attorney's fees.

previous renewals of notes given by them to the State Bank that two notes for the sum of \$2,500.00 each were included in such renewals and that they had subsequently paid each of the \$2,500.00 notes and therefore should be given credit on the note in question. It is also contended by defendants in error that in the making of said renewal notes they were executed for \$5,000.00 more than defendants in error owed said State Bank as an accommodation to it in order to enable the State Bank to borrow money for its use by discounting said notes with the Federal Reserve Bank.

· From the evidence offered by plaintiff in error it was shown

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by the records of the State Bank that notes were given by the respective defendants in error to said State Bank as follows: - By both defendants in error on February 7, 1921, note for \$900.00; by defendant in error, Robert Woolard, on same date for \$1,400.00 and \$3,750.00; by defendant in error, Mary Woolard, on January 14, 1931, for \$200.00; by Robert Woolard on March 24, 1921, for \$500.00; by Robert Woolard on June 7, 1921, for \$300.00; by Robert Woolard on August 31, 1921, for \$329.08; the total of these seven notes aggregating the sum of \$7,379.08. On September 30, 1921, all of these notes were paid by a renewal note executed by Robert Woolard to the State Bank for the sum of \$8,072.46, the difference between the amount of said seven notes and the renewal note of \$8,072.46 being applied as a discount on the renewal note and the balance, amounting to \$273.08, was deposited to Robert Woolard's account. On January 26, 1922, Robert Woolard renewed his previous note in the sum of \$8,700.00 and the difference was deposited to Robert Woolard's account. This latter note was again renewed on March 28, 1922, for the same amount and on July 10, 1922, defendants in error paid to the State Bank \$1,000.00 as principal and \$498.50 as interest, and gave to the bank their renewal note for the balance in the sum of \$7,700.00, which note was again paid by

the respective late, dante in although the great Title Turn s iollows:- By dota defineante in error of Tebruny f 3021, note for 1900.00: by defeaths in strong, retord Poolsma, ca case wave too (2,100. C antifaling the by Larentant in er.or, Mary Tookard, on January 14, 1801, for (1991, 20 loss of based freedom to 100.001) act \$500. G; by Robert Floting or Stacky, init, for followers by Robert Floater is Asgret it is it. 1881, the jack of the ictal of those seven copes actropolitic views send ", 37 . 03. On http://www.ale.ide.com wase paid by a secreal write areaves, if Friers include to the State Boar wor the number of a state of the search าส์ส ธ์ทย (จุร พ.ศ.ครรส พ.ศ.ค. 1) สะมอกของได้ มีและใช้อยี่ 9048 remeral and a of diggra. Sorbeing a plifted as a afrocut un -40,18, or modernous postely out his con us coop or with the filter of a first of the an arms. Our Jamesta edit in otto philipping with a binder head of the weeks of this នាក្រុង ខែព្រះ នៃសុខ ១១ ខែមុខ ដែល សុវ ១ភព នៃ ១ភព នៃ ១ភព នេះ ១ភព និង ១ភព នេះ ១ភព និង ១ភព និង ១ភព និង ១ភព និង ១ភ and the experience of the control of July 10, 182 , dofestalve in a mil an all all all મેં માન કૃષ્યું, મેની. જાન મુખ્યાવવીકુનો હતા. તેને જાત દેવને જો તેને જો તેને જ និងក្រុង មិនតំបានសម្តេច ស្រែង សមានសម្រាជ្ញា ស្រែង សមានស្រែង សមានស្រែង សមានស្រែង សមានសមានិង សមានសមានិង សមានិង ស ા મોકલ કાર્યાં છે. તેમ માન્ય કાર્યાં, જો જેવા કેટ છે છે. જે છે છે

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renewal on January 17, 1923, by defendants in error executing a note for the same amount. On June 11, 1923, Robert Woolard gave to one George S. Clark his note for \$125.00 which was by Clark endorsed to the State Bank. On July 3, 1923, defendant in error gave to the State Bank his note for \$500.00 and on the same date executed another note to the State Bank for \$700.00, these three notes, namely the \$125.00 note, the \$500.00 note and the \$700.00 note, together with the \$7,700.00 note were on September 26, 1923, paid by renewal by giving to the State Bank their note for \$9,025.00.

The said note of \$3,750.00 given by Robert Woolard to the State Bank on February 7, 1921, was given by him in the purchase of thirty shares of stock in the said State Bank and defendants in error do not question the original consideration for this note.

Robert Woolard some time after the purchase of this stock was made a director of the State Bank and continued as such until it was placed in liquidation and taken over by plaintiff in error in the early part of the year 1934.

The State Bank in November, 1933, became involved in financial difficulties, and through its Board of Directors, including the said Robert Woolard, entered into contract with plaintiff in error whereby plaintiff in error assumed the liabilities of the State Bank and provided for the liquidation of the State Bank.

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of the contract for liquidation of the State Bank a part of the assets of the State Bank which had been rediscounted at the Federal Reserve Bank of St. Louis. Some time after the making of said contract the Federal Reserve Bank called on plaintiff in error to take up said \$9,025.00 note, and it paid the Federal Reserve Bank the amount of the note and interest. Thereafter on January 20, 1924, defendants in error renewed said \$9,025.00 note by giving to the State Bank their note for \$9,000.00 (being the note in question) and an additional note for \$236.80, which was used to pay the interest and \$25.00 on the principal.

Defendants in error on the trial did not deny liability for the original note of \$3,750.00 given for bank stock, nor did they deny owing the notes for the respective sums of \$125.00, \$500.00 and \$700.00 given in the year 1923 to said State Bank, making a total of \$5.075.00.

Robert Woolard, defendant in error, testified that \$5,000.00 of the original \$8,700.00 was included in that note in order to procure money to be loaned out by the State Bank, and on cross examination it appeared that this testimony was based on a conversation had with one Howard P. French, President of said State Bank, who had since died, and for that reason the evidence was stricken from the record on motion of plaintiff in error. Robert Woolard further testified, denying any knowledge of the

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notes that he had in the State Bank other than the \$3,750.00 note at the time he executed the renewals of the notes given in 1922. The record shows that defendants in error paid interest from the time of the giving of their various renewal notes and that the aggregate amount of interest so paid by defendants in error on their indebtedness exceeded a thousand dollars.

for the note in question rested on the defendants in error. See Section 34 Negotiable Instrument Law, Chap. 98;
Section 44 Cahill's Statute. Likewise the burden of proving payment rested upon the defendants in error. A consideration for a note may exist in many ways other than payment of money to the maker. When the evidence of Woolard, based upon his conversation with the deceased French (former President of the State Bank), was stricken from the record there remained no competent evidence tending to show that there was no consideration or a partial failure of consideration for the note in question.

As to defendants' in error contention that there had been a \$5,000.00 payment on the indebtedness in question by reason of the alleged fact that two previous notes for \$2,500.00 each had been included in the \$8,700.00 note which was renewed on January 26, 1922, we fail to find in the record any competent evidence which bears out or tends to prove counsel's contention. It is clearly shown by the evidence in the record that these two \$2,500.00 notes secured by a mortgage were executed by the defendants in error in the year 1919 to the State Bank and by them sold

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to two of their customers; that the defendants in error paid these notes by their check on July 11, 1922, and there was no testimony offered that these notes were in any manner involved with the note in question or in any of its previous renewals. The admission in evidence of these two \$2,500.00 notes and mortgage securing the same, together with the check showing the payment thereof, without proof connecting them with the transaction in question, was erroneous and undoubtedly misled the jury in determining the issues between the parties.

There being no competent evidence in the record tending to prove that defendants in error have any legal defense to the note sued upon, it was the duty of the trial court to direct a verdict in favor of plaintiff in error according to its motion made at the close of all the evidence. Ferrero vs.

Knights of Security, 309 Ill., 476.

For the reasons aforesaid the judgment of the Circuit Court is reversed with the finding of fact that defendants in error failed to prove any legal defense to the note counted on in plaintiff's in error declaration, and it is hereby ordered that said cause be remanded to the Circuit Court with directions to enter a judgment order confirming the original judgment by confession entered in said Circuit Court on October 20, 1924, in favor of Plaintiff in error and against said Defendants in error.

Reversed with finding of fact and direction to enter judgment order in Circuit Court.

Finding of fact and judgment order: We find that defendants in error failed to prove any legal defense to the note sued on in plaintiff's in error declaration, and it is ordered that said cause be remanded to the Circuit Court of Wabash County with directions to enter judgment order confirming the original judgment by confession entered in said Circuit Court of Wabash County on October 20, 1924 in favor of Plaintiff in Error and against said Defendant in Error.

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For the reasons eforecall the jugment of ine Circuit Court is referred with the finding of feet that deformance in error falled to prove any legal defense to the note count. And it is horsely enered in the plaintiffs in error declaration, and it is horsely enered that eads ocuse as remanded to the Circuit Court with directions to enter a judg est order confirming the original judgment by confession entered in said Circuit Court on Gotober 30, 1954, in favor of Plaintiff in error and against said befordants in error.

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